92-1490

No. ___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

JEAN LORELLE BURKE,

Petitioner,

v.

ROBERT E. JACOBY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD M. MEYER*
Suite 4915
One Pennsylvania Plaza
New York, New York 10119
(212) 594-5300

Attorney for Petitioner

Of Counsel:
LEE S. SHALOV
MILBERG WEISS BERSHAD SPECTHRIE & LERACH
One Pennsylvania Plaza
New York, New York 10119

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Where material facts are misrepresented and omitted by the chief executive officer in connection with a securities transaction involving the sale of his corporation, is it sufficient under Section 10(b) of the Securities Exchange Act for a defrauded shareholder to establish that, not only were the misstatements and omissions material, but, had truthful information been provided, the terms of the transaction which allocated the sale proceeds would have been objected to by herself, the company's directors and her fellow stockholders whose approval was required; or must she also show that she would have dissented from the sale in its entirety?

2. Where the chief executive officer misappropriates a substantial portion of the proceeds from the sale of his corporation without informing the other shareholders of their rights of appraisal, should the Court of Appeals utilize an available state certification procedure to enable the New York Court of Appeals to determine the previously undecided question of liability under state law?

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OPINIONS BELOW

The October 10, 1991 opinion of the District court for the Southern District of New York is reported at [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,499. The opinion of the Court of Appeals for the Second Circuit is not yet reported.

JURISDICTION

The decision of the Court of Appeals for the Second Circuit was dated and filed December 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Due to their length, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), Rule 10b-5 promulgated thereunder, 17 C.F.R. 240.10b-5, New York Business Corporation Law Section 605 and New York Rules of Court Section 500.17 are set forth in the appendix at 59a.

STATEMENT OF THE CASE

Petitioner was the owner of 700 shares of Class A stock of Ted Bates Worldwide, Inc. ("Ted Bates" or the "Company") and brought this action on behalf of herself and all other persons (approximately 320, excluding respondent Robert A. Jacoby and affiliated persons) who

owned shares of Class A stock on August 7, 1986.[1] On that day, the Company was acquired by Saatchi & Saatchi, PLC ("Saatchi" and the "Saatchi Acquisition") for $507.4 million. At that time, respondent was CEO and controlling shareholder of Ted Bates, although owning only 6% of the equity represented by the Class A common stock. He also owned all of the Class B stock – 30,000 shares – which gave him voting control of the day-to-day operations of the business.

In connection with the acquisition, respondent had the Company "redeem" his Class B shares for $40 million in contravention of a stockholders agreement which established a fixed value of $15,000 for the B shares. In negotiating the acquisition, he arranged to receive another $49 million for stock options he had surreptitiously awarded to himself in 1982. Respondent also arranged for two Ted Bates' secretaries and intimate personal friends to receive approximately $1.5 million dollars of the acquisition proceeds for themselves. All of these monies diverted by respondent belonged to petitioner and the other members of the Class, and should have been distributed to them – not to respondent – in connection with the merger.

In violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, respondent misrepresented and omitted to disclose material facts to Ted Bates' shareholders in soliciting their required approval of the Saatchi

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[1] Jurisdiction was based upon Section 27 of the Exchange Act, 15 U.S.C. § 78aa; diversity of citizenship, 28 U.S.C. § 1332; and principles of ancillary and pendent jurisdiction.

Acquisition. He told the shareholders that he had a fairness opinion from Lazard Freres & Co. ("Lazard") pertaining to his B stock redemption, which he did not in fact have. He concealed the enormous number of options he held as well as the $49 million profit he was to make thereon without any investment. He did not tell the shareholders about his grant of stock to his personal friends, which deprived the shareholders of monies to which they were rightfully entitled. And he did not disclose that, in addition to Saatchi, another company had made a competing offer for Ted Bates which was as good as if not better than the terms of the Saatchi Acquisition.

Respondent moved in the District Court for summary judgment and the Court granted it in its entirety, dismissing all of the Exchange Act claims (as well as the state law claims). As to each of the Exchange Act claims, the Court dealt with them as follows:

1. The fairness of the $40 million redemption. On May 22, 1986, a shareholders meeting was convened to consider the Saatchi Acquisition. Nearly all of the 320 class A stockholders attended. At the meeting, respondent, in order to obtain the necessary approval from the Class A shares, announced that Lazard Freres, an independent investment banker, had stated that the $40 million price to be paid to respondent for his Class B shares was a fair price. In fact, Lazard stated no such thing and expressly disclaimed such an opinion. (31a, 36a, 56a, 57a-58a).

The District Court, ignoring the fact that the approval sought and needed was that of the entire stockholder body, as well as the directors, invited petitioner to submit

an affidavit that she relied upon the misrepresentation. She submitted an affidavit stating, "I did rely on Mr. Jacoby's representation and therefore voted as he recommended. Had I known of the falsity of that representation, I would have objected to the allocation of the proceeds of the merger on the terms then set forth."[2] (52a) The Court found this insufficient, holding, "She does not state that she would have dissented from the merger.[3] Thus, since there is no evidence of loss causation, an essential element of a claim of fraud in connection with the purchase or sale of securities, Jacoby's motion for summary judgment on this part of the Section 10(b) claim is granted." (37a)

2. Concealment of the 80,000 options. The acquisition agreement provided that option holders would receive in cash the difference between the option price and the acquisition price of the stock. The District Court agreed that respondent did not disclose to the shareholders the number of options he owned or the extent of his potential profit ($49 million). The Court also found that these facts were material. Nevertheless, it dismissed this claim as well: "Plaintiff, however, has never stated

---

[2] One of the corporate directors submitted a similar affidavit stating, "I am now told . . . that Lazard denied opining that the $40 million price paid to Jacoby was 'fair'. . . . I believe that had I known the true facts, I would have objected to Jacoby's diversion of these monies for his own benefit which monies should rightfully have been distributed to the Company's shareholders." (54a).

[3] Contrary to the requirements of New York Business Corporation Law § 605, the notice of meeting failed to advise shareholders of their right to dissent and obtain appraisal. (30a-31a).

that she would have voted against the merger even if she had been apprised of Jacoby's option holdings or potential profit on them, despite my invitation for her to do so." (39a) Contrary to the Court's statement, the only "invitation" it issued was limited to the Lazard Freres opinion.

3. Respondent's allocation of stock to intimate friends. At the time of the negotiations with Saatchi, the Company had in place a stock purchase plan for key executives. As chief executive officer, respondent was authorized to approve the sale of stock to such executives at book value. Having reached an agreement in principle with Saatchi, respondent secretly authorized the sale of 1,000 shares of stock to his personal secretary and 2,500 shares of stock to another secretary with whom he had been having an affair. Respondent did not reveal these grants of stock, and many of the directors were stunned when they ultimately learned of the transactions. (54a, 56a).

Because Saatchi was negotiating to acquire the entire company, it did not care how the proceeds were divided.[4] Thus, the funneling of the purchase money to respondent's women friends reduced the amount available for the other Class A stockholders. Nevertheless, the District Court dismissed this claim on the ground that the

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[4] As respondent admitted:
"Well, the Saatchis didn't really care how the money was divved [sic] up, you understand, we agreed on a number, that number was $507.4 million for the company and they did not care how it was, they wanted to make sure they got all the shares back." (58a).

diversion did not affect the price that the plaintiff received for her stock. (40a-41a, 45a).

4. The Interpublic offer. While the Saatchi negotiations were going on, the Company was simultaneously negotiating to sell out to Interpublic, a major domestic agency group. Interpublic made an offer which matched Saatchi's offer and exceeded it in two respects: (a) the entire payment was "up-front" unlike the Saatchi offer which held back $50 million of the purchase price for two years; and (b) it gave Ted Bates full operating autonomy which Saatchi's offer did not. Respondent unilaterally rejected the Interpublic offer and never conveyed it to the board of directors or the stockholders. The district Court dismissed this claim because "plaintiff has made no showing that she would have voted against the merger" had she known of the Interpublic offer. (41a).

The District Court dismissed the claim for breach of fiduciary duty in misallocation of the proceeds by holding that, under state law, the petitioner's exclusive remedy was appraisal. (42a-43a).

On appeal, the Court of Appeals affirmed the dismissal. Although three of the four claims of securities fraud attacked the allocation of the sales proceeds among the shareholders rather than the adequacy of the sale price, the Court held that the petitioner must affirmatively show that revelation would have caused her to dissent from the entire transaction. It gave no consideration to petitioner's contention that the shareholders could have insisted on a different allocation of the proceeds without changing the basic deal with Saatchi. And while paying lip service to the reactions of "a reasonable

investor," the Court focused exclusively on petitioner and refused to consider that the shareholders as a whole (most of whom were present at the May 22, 1986 meeting) were the determining forces affected by respondent's fraudulent statements and omissions. Thus the Court held:

> In the present case, there may be, as the district court noted, questions of fact as to whether the alleged omissions were material, or whether the description of the Lazard Freres opinion was a material misrepresentation, in the sense that reasonable stockholders might have considered the accurate information important to their decisions as to whether or not to vote for the acquisition. And it may be, as to the claims of omissions, that the undisclosed information was material, thereby prima facie establishing reliance. But these questions of materiality and reliance are not issues of material fact in the context of the summary judgment granted in the present case because, as we read the district court's opinion, the court dismissed Burke's federal securities claims – whether based on affirmative misrepresentation or omission – for lack of proof of loss causation. . . .
>
> The record supports the district court's view that Burke had come forward with no evidence that the claimed misrepresentations or omissions caused her any injury, for she concedes that, whatever importance she might have placed on the undisclosed information, she would not have performed the act that was necessary to obtain a better price for her shares than she received, *i.e.*, dissent from the merger. . . . Burke's affidavit stated that she would have objected to "the allocation of the proceeds of the merger"; but she did not state she would have dissented, which would have required her to

> forgo the large profit to be had on her own shares. At no point did Burke suggest that she would have voted against the acquisition had she known any or all of the facts she claims were not disclosed to her. . . .
>
> The record thus contains no evidence whatever from which a reasonable juror could conclude that any of the alleged misrepresentations or omissions caused Burke any loss. Accordingly, the district court properly dismissed the timely asserted securities claims for lack of evidence of causation.

(15a-16a).

Denying the motion of petitioner for certification to the New York Court of Appeals of the breach of fiduciary duty claim, the Court of Appeals held that appraisal was petitioner's exclusive remedy. (17a).

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

The applicable standard of causation in cases of nondisclosure under Rule 10b-5 was set forth by this Court in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972). There, this Court held (at 153-154):

> Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them

> important in the making of this decision. [Citations omitted] This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact.

The Court reaffirmed this standard in *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988):

> There is, however, more than one way to demonstrate the causal connection. Indeed, we previously have dispensed with a requirement of positive proof of reliance, where a duty to disclose material information had been breached, concluding that the necessary nexus between the plaintiffs' injury and the defendant's wrongful conduct had been established.

In *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), the Court set forth the following standard of materiality:

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . . It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. . . . Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

This standard applies to actions arising under Section 10(b) as well as Section 14 of the Exchange Act. *Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988). Indeed, both Courts below acknowledged the materiality as well as the falsity of the challenged statement and omissions.

Three of the four claims – all save the Lazard misrepresentation – are claims of omission. The standard of causation in cases of affirmative misrepresentation is not substantially different. A plaintiff seeking to recover for the defendant's affirmative misstatement "is not required to prove that the defendant's act was the sole and exclusive cause of his injury; he need only show that it was 'substantial,' i.e., a significant contributing cause." *Wilson v. Comtech Telecommunications Corp.*, 648 F.2d 88, 92 (2d Cir. 1981), *citing Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27, 34 (2d Cir. 1976).

In *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the Court upheld the maintainability of a shareholder action by shareholders who were not themselves misled but who alleged that a merger had been accomplished by using a misleading proxy statement.[5] On the question of the causal connection between the false statement and the harm to the plaintiff shareholders, the Court held:

> Where the misstatement or omission in a proxy statement has been shown to be "material," as it was found to be here, that determination itself indubitably embodies a conclusion that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote. . . . There is no need to supplement this requirement, as did the Court of Appeals, with a requirement of proof of whether the defect actually had a decisive effect on the voting. Where there has been a finding of

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[5] The Court also held that a finding that the merger was on fair terms did not constitute a defense.

> materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction.

Mills, 396 U.S. at 384-85 (footnote omitted).

By inducing the shareholders to accept the B share redemption scheme, respondent's false statement regarding the Lazard opinion was a substantial contributing cause of the Class A shareholders' injury. His false statement was designed to and did induce the shareholders to approve the transaction, when a true and accurate disclosure of the facts surrounding Lazard's opinion – its refusal to opine that the $40 million price was "fair" – would likely have prompted the shareholders to object to the payment and force distribution of the B share proceeds to them, not to respondent. Unlike a large public company with thousands of shareholders, Ted Bates had only about 320 Class A shareholders, most of whom were present at the May 22, 1986 meeting. Since their approval was needed, objections by persons (such as key directors (54a, 56a-57a)) would in all likelihood have led, at a minimum, to negotiation of the distribution of the proceeds, without the need for renegotiating the total price with Saatchi. Thus, it was not necessary for petitioner to show that "she would have dissented from the merger."

In short, respondent's misconduct succeeded in depriving the shareholders of the means to obtain monies to which they were rightfully entitled (or was a substantial contributing cause in bringing about such loss and

injury), by preventing them from effectuating a restructuring of the transaction. The requisite causal link between respondent's misstatement and petitioner's injury therefore exists under the circumstances of this case. At the very least, the causal relationship between misstatement and injury is a question to be decided by the trier of fact upon a full and complete development of the record. The Court of Appeals, deciding otherwise, ignored principles solidly established by this Court.

II.

THE COURT OF APPEALS DECISION CONFLICTS WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS

The Court of Appeals' holding that petitioner cannot maintain the action unless she can demonstrate that she would have dissented from the merger is at odds with the holdings of nearly every other circuit, as well as with the prior law in the second circuit. Those courts follow the holdings of this Court that material falsity need not be supplemented "with a requirement of proof of whether the defect actually had a decisive effect on the voting." *Mills v. Electric Auto-Lite Co., supra,* 396 U.S. at 384-85. *See Holmes v. Bateson,* 583 F.2d 542, 558 (1st Cir. 1978) (following *Affiliated Ute* principle of causation); *Wilson v. Comtech Telecommunications Corp.,* 648 F.2d 88, 93 (2d Cir. 1981) ("To be sure, under [*Affiliated Ute*], causation in fact may be established in the case of a nondisclosure if the information withheld is found to be material."); *Rochez Bros., Inc. v. Rhoades,* 491 F.2d 402, 410 (3d Cir. 1974) (following *Affiliated Ute* principle of causation); *Carras v. Burns,* 516

F.2d 251, 257 (4th Cir. 1975) ("*Affiliated Ute* also teaches that causation can be established by proof of the . . . non-disclosure."); *The Toledo Trust Co. v. Nye*, 588 F.2d 202, 207, n.21 (6th Cir. 1978) (following *Affiliated Ute* principle of causation); *Swanson v. American Consumers Industries, Inc.* 475 F.2d 516, 523 (7th Cir. 1973) ("Under the 'obligation to disclose' standard of *Affiliated Ute Citizens*, the withholding of a material fact or facts, as here, established the requisite element of causation in fact."); *Rowe v. Maremont Corp.*, 850 F.2d 1226,1233, n.4 (7th Cir. 1988) ("Also, in face-to face transactions involving only material omissions, a plaintiff need not prove reliance; the omission's materiality and the defendant's duty to disclose supply the requisite causation."); *Harris v. Union Electric Company*, 787 F.2d 355, 366-67 (8th Cir.), *cert. denied*, 479 U.S. 823 (1986) ("the causation element is established if the facts that were withheld are material."); *Harmsen v. Smith*, 693 F.2d 932, 946, n.11 (9th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983) ("Further, if omissions or nondisclosures meet the standards of materiality to a reasonable investor [citations omitted], causation and reliance can be assumed."); *T.J. Raney & Sons v. Fort Cobb, Okl. Irr. Fuel*, 717 F.2d 1330, 1333 (10th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984) (Following *Affiliated Ute* principle of causation); *Lipton v. Documation, Inc.*, 734 F.2d 740, 742-43 (11th Cir. 1984), *cert. denied*, 469 U.S. 1132 (1985) (following *Affiliated Ute* principle of causation).

III.

THE COURT OF APPEALS HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, CALLING FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION

In addition to the Exchange Act claims, the petitioner asserted state law claims (pursuant to diversity as well as pendent jurisdiction). Principal among these was the claim that respondent breached his fiduciary duty to the other shareholders by diverting $40 million of the sale proceeds to redeem his Class B Stock which had a fixed value of $15,000.

With respect to fiduciary duties, New York "has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity where petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions." *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928). *See also Matter of Estate of Rothko;* 43 N.Y. 2d 305, 319, 320, 401 N.Y.S.2d 449, 454, 455 (1977); *Eisenberg v. Central Zone Property Corp.*, 306 N.Y. 58, 115 N.E.2d 652 (1953).

Nevertheless, the courts below relied upon the memorandum opinion in *Walter J. Schloss Associates v. Arkwin Industries, Inc.*, 61 N.Y. 2d 700, 472 N.Y.S.2d 605 (1984), which adopted the dissenting opinion in the lower court, 90 A.D.2d 149, 455 N.Y.S.2d 844 (2d Dept 1982), holding that a stockholder complaining of an unfair merger waived his rights by not availing himself of appraisal procedures. Because, in violation of New York Business Corporation Law Section 605, neither petitioner nor the

other stockholders were advised of the availability of appraisal rights – unlike the shareholders in *Schloss* (*see* 455 N.Y.S. 2d at 845) – the *Schloss* rationale does not apply to the present case. *See Rank Organization Limited v. Pathe Laboratories*, 33 Misc.2d 748, 227 N.Y.S.2d 562, 567 (Sup. Ct. N.Y. County 1962):

> If, by reason of the form and method of transmission of the purported notice, the minority stockholder has not been afforded a real opportunity to act within the period prescribed by the statute, the majority stockholder should not in equity be heard to take advantage of the lapse. Majority stockholders owe the minority the utmost good faith and may not in defiance of this fiduciary duty use their power in disregard and to the expense of the interests of the minority (*Kavanaugh v. Kavanaugh Knitting Co.*, 226 N.Y. 185, 195, 123 N.E. 148, 151; *Warnecke v. Forty Wall Street Building, Inc.*, 8 Misc.2d 317, 323, 169 N.Y.S.2d 150, 155; *Ribakove v. Rich*, 13 Misc. 2d 98, 101-102, 173 N.Y.S.2d 306, 309-311; *Pepper v. Litton*, 308 U.S. 295, 306-307, 311-312, 60 S.Ct. 238, 84 L.Ed.281).

Petitioner so argued in both courts below and moved, pursuant to New York Rules of Court Section 500.17, for certification of the question to the New York Court of Appeals. The Second Circuit denied the motion without discussion and adopted *Schloss* without mentioning the crucial difference.

Here, because of the dubiousness of the Second Circuit's decision and the easy availability of the certification procedure, utilization of that procedure is

particularly appropriate. As this Court stated in *Lehman Brothers v. Schein*, 416 U.S. 386, 390-91 (1974):

> We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism.[8]

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[8] See Wright, the Federal Courts and the Nature and Quality of State Law, 13 Wayne L.Rev. 317 (1967); Kurland, Toward a Cooperative Judicial Federalism: The Federal Court Abstention Doctrine, 24 F.R.D. 481 (1960); Note, Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism, 111 U.Pa.L.Rev. 344 (1963); Note, Florida's Interjurisdictional Certification: A Reexamination to Promote Expanded National Use, 22 U.Fla. L.Rev. 21 (1969). [Footnote by the Court]

See also 1A – Part 2 Moore's Federal Practice ¶ 0.308[3] (1992), and authorities there cited.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Dated: New York, New York
March 12, 1993

Respectfully submitted,

RICHARD M. MEYER*
49th Floor
One Pennsylvania Plaza
New York, New York 10119
(212) 594-5300

Attorney for Petitioner

Of Counsel:

LEE S. SHALOV
MILBERG WEISS BERSHAD
SPECTHRIE & LERACH
One Pennsylvania Plaza
New York, New York 10119

*Counsel of Record

APPENDIX

COURT OF APPEALS DECISION DATED DECEMBER 29, 1992

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1063 – August Term, 1991

(Argued: March 4, 1992 Decided: December 29, 1992)

Docket No. 91-9148

JEAN LORELLE BURKE,

Plaintiff-Appellant,

– v. –

ROBERT E. JACOBY,

Defendant-Appellee.

Before:

KEARSE and ALTIMARI, *Circuit Judges,*
and TELESCA, *Chief Judge**.

Appeal from a judgment of the United States District Court for the Southern District of New York, Miriam Goldman Cedarbaum, *Judge,* dismissing complaint charging federal securities fraud and state law violations.

Affirmed.

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* Honorable Michael A. Telesca, Chief Judge of the United States District Court for the Western District of New York, sitting by designation.

RICHARD M. MEYER, New York, New York (Lee S. Shalov, Milberg Weiss Bershad Specthrie & Lerach, New York, New York, on the brief), *for Plaintiff-Appellant.*

JOHN HARTJE, New York, New York (A. Kaiper Wilson, Robert S. Shwarts, Kronish, Lieb, Weiner & Hellman, New York, New York, on the brief), *for Defendant-Appellee.*

KEARSE, Circuit Judge:

Plaintiff Jean Lorelle Burke, a former employee and stockholder of Ted Bates Worldwide, Inc. ("Bates" or the "Company"), appeals from a final judgment of the United States District Court for the Southern District of New York, Miriam Goldman Cedarbaum, *Judge*, dismissing her complaint for damages against defendant Robert E. Jacoby under § 10(b) of the Securities and Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78j(b) (1988), Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (1992), and state law, alleging misrepresentations, omissions, breach of contract, and breaches of fiduciary duty in connection with the acquisition of Bates by another company. The district court granted summary judgment dismissing the complaint principally on the grounds (1) that certain of the alleged omissions concerned facts already known by Burke, (2) that Burke failed to come forward with evidence that she had relied on the alleged misrepresentations or omissions or that they had caused her claimed loss, and (3) that certain of her claims were barred by the statute of limitations. On appeal, Burke contends, *inter*

alia, that the district court applied erroneous legal standards of reliance and causation in assessing her federal securities claims and that partial summary judgment should have been entered in her favor on the breach-of-contract claim. She also argues that the district court's statute-of-limitations ruling with respect to one of the federal securities claims must be set aside in light of a recent amendment to the 1934 Act. For the reasons below, we reject her contentions and affirm the judgment of the district court.

I. BACKGROUND

A. *The Bates-Saatchi Merger*

Prior to August 1986, Bates was an employee-owned advertising company. Jacoby was its president, chairman, and chief executive officer, as well as its controlling stockholder. Bates had two classes of stock. Class A was issued to key executives of the Company. A "Stockholders Agreement" limited the transferability of such stock, permitting its resale only to the Company, or to designated employees, at a price calculated principally by dividing the Company's net asset value by the number of Class A shares outstanding. Burke owned 700 shares of the Class A stock. Jacoby owned 27,750 Class A shares; in addition, as authorized by a shareholder resolution adopted in 1982, he had options covering 80,000 Class A shares.

All of the Bates Class B stock, of which there were 30,000 shares, was owned by Jacoby. The stockholders Agreement also restricted transfer of the Class B stock, the repurchase price of which was fixed at $.50 per share.

Under the certificate of incorporation, each Class A share, of which fewer than 500,000 were outstanding, had one vote; each of the 30,000 Class B shares had 50 votes. Thus, Jacoby, with more than 1,500,000 votes, had voting control of the Company.

In August 1986, Bates was acquired by Saatchi & Saatchi Company, PLC ("Saatchi"). The Acquisition Agreement, approved by the Bates Stockholders in May 1986, principally (1) required Bates prior to the closing (a) to redeem 22,788 Class A shares for $17.4 million, and (b) to redeem Jacoby's 30,000 Class B shares for $40 million; (2) allowed Bates prior to the closing to sell some 30,000 Class A shares to approximately 20 employees; and (3) required Saatchi to pay a total of $450 million in cash to persons who, at the time of the closing, held Class A shares or options. Each holder of Class A stock was to receive $765.3953 per share upon completion of the acquisition, plus $87.6286 per share two years later, for a total of approximately $853 per share. Holders of stock options were to receive the same price per share, minus the exercise price of the option. The Acquisition Agreement also provided appraisal rights for stockholders who dissented.

At the May 1986 stockholders' meeting, Jacoby spelled out the above terms, noting that, absent the acquisition, the book value of the Class A stock at the end of the fiscal year would be $390 per share. When he announced the acquisition price of approximately $853 per Class A share, the stockholders, including Burke, applauded. As to the Class B stock repurchase, Jacoby stated, "We have had a separate outside investigation by a respected investment banking house, Lazard Freres,

and they have stated that the price to be paid for Class B shares which will be redeemed at or prior to closing for $40,000,000 is a fair one." The shareholders, including Burke, approved the proposed Saatchi transaction. They also unanimously approved a resolution terminating the stockholders Agreement, effective upon consummation of the acquisition.

Pursuant to the Acquisition Agreement, Jacoby received a total of $112.6 million, consisting of the $40 million for his $30,000 Class B shares, $23.6 million for his 27,750 Class A shares, and $49 million for his Class A stock options. For her 700 shares, Burke received the per-share amounts specified by Jacoby in the May 1986 stockholders' meeting presentation. In her letter transmitting her stock to Saatchi, Burke acknowledged that the Stockholders Agreement restricting transferability of the stock was rescinded concurrently with the consummation of the acquisition.

B. *The Present Lawsuit*

In March 1989, Burke commenced the present action for damages, alleging that Jacoby had misrepresented or failed to disclose certain material facts in connection with the Saatchi acquisition. The complaint alleged principally (a) that Jacoby had failed to disclose in 1982 that he would receive options on the Class A shares; (b) that Jacoby had failed to disclose in May 1986 that, while negotiating with Saatchi, Bates had received a competing offer that Jacoby summarily rejected; (c) that Jacoby had failed to disclose in May 1986 how many Class A stock options he held; and (d) that Jacoby had misrepresented the investment banker's opinion of the price for the Class

B shares, stating that the banker had termed the price "fair," when in fact the banker had said that the price was "reasonable." The complaint also alleged, *inter alia*, that Jacoby breached his fiduciary duty (a) by accepting $40 million for his 30,000 Class B shares as, in essence, a "control premium," and (b) by having Bates sell a total of 3,500 Class A shares to two employees who were not executives but secretaries. Burke sought damages and an "accounting" of Jacoby's profits from the Saatchi transaction.

Following a period of discovery, Burke moved for partial summary judgment principally on the ground that Jacoby's receipt of $40 million for his Class B shares breached the Stockholders Agreement. Jacoby cross-moved for summary judgment dismissing the entire complaint on the grounds, *inter alia*, that Burke could not show that any of the alleged misrepresentations or omissions had been relied on or had caused her injury, and that she was not entitled to damages on any of her state-law claims.

After receiving voluminous papers and hearing oral argument, and after inviting and receiving a postargument affidavit from Burke, the district court granted Jacoby's motion for summary judgment and denied Burke's motion. In a Memorandum Opinion and Order dated October 10, 1991 ("Opinion"), the court ruled that insofar as Burke's securities claims rested on events that occurred in 1982, they were barred by the one year/three year statute of limitations adopted in *Ceres Partners v. GEL Associates*, 918 F.2d 349 (2d Cir. 1990) (one year from discovery, but not more than three years from occurrence), and *Lampf, Pleva, Lipkind, Prupis & Petigrow v.*

Gilbertson, 111 S. Ct. 2773 (1991) (same), and made retroactive by *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991). As set forth below, the court dismissed the remaining securities claims on the ground that Burke had not come forward with evidence of reliance or causation, noting that Burke "does not assert that she would have voted against the merger even if she had been aware of the extent of [Jacoby]'s self-dealing, and even now, she does not wish to undo the merger." Opinion at 2.

As to the claim based on Jacoby's statement that the investment banker had said that $40 million was a "fair," instead of a "reasonable," price for the Class B stock, the court stated that Burke failed to show that the "misrepresentation complained of was at least a 'but for' cause of the transaction in question," Opinion at 12, and that there was "no evidence of loss causation," noting as follows:

> At the oral argument of this motion, I invited Burke's counsel to submit evidence, in the form of an affidavit from Burke, that she relied upon Jacoby's description of Lazard's opinion in deciding to sell her shares. (*See* Hearing Tr. at 19-20.) In response, Burke submitted an affidavit stating only: "Had I known of the falsity of that representation, I would have objected to the allocation of the proceeds of the merger on the terms then set forth." She does not state that she would have dissented from the merger. Thus, since there is no evidence of loss causation, an essential element of a claim of fraud in connection with the purchase or sale of securities, Jacoby's motion for summary judgment on this part of the Section 10(b) claim is granted.

Opinion at 12. As to the claimed omissions, the court observed that Burke

> has never stated that she would have voted against the merger even if she had been apprised of Jacoby's option holdings or potential profit on them, despite my invitation for her to do so. (*See* Hearing Tr. at 19-20; Burke Aff.) On the contrary, she has maintained the position that the total sale price was an "excellent" one (P. Mem. in Opp'n to Summ. J. at 1) and that she is not " 'dissenting from' " the merger (*id.* at 54).

Opinion at 14-15; *see id.* at 17 (as to the third-party offer to buy the Bates stock, "[a]gain . . . plaintiff has made no showing that she would have voted against the merger had she been in possession of the information" and hence "has failed to make the requisite showing of loss causation"). The court noted that a § 10(b) plaintiff "must establish that the misrepresentations complained of caused the injury suffered," Opinion at 15, and concluded that

> although there may be a genuine issue of material fact as to whether the omission plaintiff complains of was material and misleading, there is no evidence that it affected her vote or her desire to sell her shares. Thus, the misrepresentation cannot be said to have caused the alleged injury.

Id.

The court also ruled, *inter alia*, that since Burke disavowed any desire to rescind the transaction, not wishing to forgo what she had received in the transaction, she was

not entitled to challenge that part of the transaction that resulted in the payment to Jacoby for his Class B shares.

Judgment was entered dismissing the complaint, and this appeal followed.

II. DISCUSSION

On appeal, Burke, stating that "[p]laintiff approves of the merger and the price which Saatchi paid for the Company" (Burke brief on appeal at 39 n.16), pursues her attempt to have much of the payment received by Jacoby redistributed to other Class A stockholders. She contends principally that, in light of an amendment to the 1934 Act, her securities claim based on the 1982 stock options is not barred by the statute of limitations; that the district court applied erroneous legal standards of reliance and causation to her other federal securities claims; that the court erred in ruling that statutory appraisal was her only remedy for the claim that Jacoby breached his fiduciary duty to Bates shareholders by receiving $40 million for his 30,000 Class B shares; and that the court erred in not ruling that as a matter of law the $40 million payment to Jacoby for his Class B shares breached the Stockholders Agreement. For the reasons below, we find no basis for reversal.

A. *The Statute of Limitations on the 1982 Nondisclosure Claim*

Burke contends that notwithstanding the one year/three year limitations period for claims under Rule 10b-5 established by *Ceres Partners v. GEL Associates*, 918 F.2d

349 ("*Ceres*"), and *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S.Ct. 2773, and the ruling in *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439, requiring that the one year/three year rule be applied retroactively, her claims based on 1982 events have been revived by the recently enacted § 27A of the 1934 Act, 15 U.S.C.A. § 78aa-1 (West Supp. 1992), which modifies the retroactivity of the one year/three year rule. Her reliance on § 27A is misplaced.

Section 27A(b) provides that the limitation period for a claim under § 10(b) or Rule 10b-5

> commenced on or before June 19, 1991 – (1) which was dismissed as time barred subsequent to June 19, 1991, *and (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction*, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff.

15 U.S.C.A. § 78aa-1(b) (West Supp. 1992) (emphasis added). As indicated by the language emphasized, this section does not authorize reinstatement of a claim that would have been time-barred under the principles applicable on June 19, 1991. Leaving aside the question of whether, in light of § 27A(b), the *Ceres* rule, adopted by this Court prior to June 19, 1991, is to have retroactive application to claims filed prior to the *Ceres* decision, *see Henley v. Slone*, 961 F.2d 23, 25-26 (2d Cir. 1992), that section affords Burke no relief, for her claim was time-barred even under pre-*Ceres* precedent. *See generally Grondahl v. Merritt & Harris, Inc.*, 964 F.2d 1290, 1292-93 (2d

Cir. 1992) (no need to analyze applicability of *Ceres* if claim would also have been barred under pre-*Ceres* rule).

Prior to *Ceres*, a Rule 10b-5 action that accrued in New York and was brought in a district court within New York was time-barred in this Circuit if not brought "within six years from the time the cause of action accrued or within two years from the time the wrongdoing was, or with reasonable diligence should have been, discovered." *Armstrong v. McAlpin*, 699 F.2d 79, 87 (2d Cir. 1983), *see also Stull v. Bayard*, 561 F.2d 429, 431-32 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978). Here Jacoby's allegedly wrongful acquisition of stock options occurred in May 1982. The issuance of such options was approved at the 1982 annual meeting of stockholders, and Jacoby disclosed at that meeting that he was one of the employees who would receive options pursuant to the plan. Though Burke claims that she did not know in 1986 how many options Jacoby held, she does not dispute that she knew in 1982 that the stock option plan had been approved by the stockholders and that she knew in 1982 that Jacoby had been awarded options. The claim in the present action that Jacoby violated the securities laws in 1982 by not informing stockholders prior to their approval of the stock option plan that he intended to award himself 80,000 shares was not asserted until 1989, more than six years after the options were issued and more than six years after Burke knew that some options had been awarded. Thus Burke's claim would have been untimely even prior to the adoption of the one year/three year limitations period in *Ceres*. Accordingly, even if *Ceres* were not to be applied retroactively to claims pending at

the time of its decision, § 27A(b) does not authorize reinstatement of Burke's claim.

Burke's contention that even the six-year limitations period should not bar her claim because of principles of equitable estoppel has no merit. The record plainly reveals that Burke had sufficient facts to inquire, if she had been interested, into precisely how many shares were optioned to Jacoby, and she has come forward with no evidence of any form of concealment on the part of Jacoby.

B. *Reliance and Causation*

In her challenge to the dismissal of the remaining securities claims, Burke contends that the district court, in finding dispositive her failure to show that she would have dissented from the acquisition that she had full knowledge of the facts, applied erroneous standards of reliance and causation. Even if we interpreted the district court's opinion as imposing an improper standard of reliance with respect to Burke's claims of misleading omissions, the court's standard of causation was clearly proper, and hence we see no basis for reversal.

Rule 10b-5 makes it unlawful, in pertinent part, "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, . . . in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5. In order to prove a claim under § 10(b) or Rule 10b-5, a plaintiff must show, *inter alia*, that the defendant, with scienter, made a misrepresentation of

material fact or failed to disclose a material fact, and that the plaintiff relied on the misrepresentation or omission and suffered a loss as a result of the misrepresentation or omission. *See, e.g., Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 61 (2d Cir. 1985). The reliance element of the claim is sometimes referred to as "transaction causation," and the causation element is sometimes referred to as "loss causation." *See, e.g., Litton Industries, Inc. v. Lehman Brothers Kuhn Loeb Inc.*, 967 F.2d 742, 747 (2d Cir. 1992); *Bennett v. United States Trust Co.*, 770 F.2d 308, 313 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986). The two concepts are closely allied, for there generally is no causation without reliance. There can, however, be reliance without causation.

A plaintiff's burden with respect to the reliance element of a Rule 10b-5 claim may vary depending on whether the claim alleges fraudulent representations or fraudulent omissions. In connection with a claim that the defendant has affirmatively made false statements, plaintiff must demonstrate that he or she relied on the misrepresentation when entering the transaction that caused him or her economic harm. *See, e.g., Wilson v. Ruffa & Hanover, P.C.*, 844 F.2d 81, 86 (2d Cir. 1988), *aff'd on reh'g sub nom. Wilson v. Saintine Exploration & Drilling Corp.*, 872 F.2d 1124 (2d Cir. 1989); *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 380 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975). In connection with a claim of material omission, however, "positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision." *Affiliated Ute Citizens v. United States*,

406 U.S. 128, 153-54 (1972); *see also duPont v. Brady*, 828 F.2d 75, 78 (2d Cir. 1987) (" 'in instances of total non-disclosure, . . . it is of course impossible to demonstrate reliance' ") (quoting *Titan Group, Inc. v. Faggen*, 513 F.2d 234, 239 (2d Cir.), *cert. denied*, 423 U.S. 840 (1975)). Thus, "once the plaintiff establishes the materiality of the omission by a preponderance of the evidence, the burden shifts to the defendant to establish also by a preponderance of the evidence that the plaintiff did not rely on the omission in making the investment decision." *duPont v. Brady*, 828 F.2d at 76; *see also Litton Industries, Inc. v. Lehman Brothers Kuhn Loeb Inc.*, 967 F.2d at 748.

Summary judgment should be granted only if there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). In order to obtain that relief, the moving party need not prove that his opponent's case is wholly frivolous. When a defendant has moved for summary judgment on the ground that undisputed facts reveal that the plaintiff cannot establish an essential element of the claim, on which element the plaintiff has the burden of proof, and the plaintiff has failed to come forth with evidence sufficient to permit a reasonable juror to return a verdict in his or her favor on that element, summary judgment should be granted. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). If the undisputed facts reveal that there is an absence of sufficient proof as to one essential element of the claim, any factual disputes with respect to other elements of the claim become immaterial and cannot defeat a motion for summary judgment. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. at 322-23; *Knight v. U.S. Fire Insurance Co.*, 804 F.2d 9, 11-12 (2d Cir. 1986), *cert. denied*,

480 U.S. 932 (1987); *Quarles v. General Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985) (per curiam).

In the present case, there may be, as the district court noted, questions of fact as to whether the alleged omissions were material, or whether the description of the Lazard Fréres opinion was a material misrepresentation, in the sense that reasonable stockholders might have considered the accurate information important to their decisions as to whether or not to vote for the acquisition. And it may be, as to the claims of omissions, that the undisclosed information was material, thereby prima facie establishing reliance. But these questions of materiality and reliance are not issues of material fact in the context of the summary judgment granted in the present case because, as we read the district court's opinion, the court dismissed Burke's federal securities claims – whether based on affirmative misrepresentation or omission – for lack of proof of loss causation. *See* Opinion at 12, 15, 17.

The record supports the district court's view that Burke had come forward with no evidence that the claimed misrepresentations or omissions caused her any injury, for she concedes that, whatever importance she might have placed on the undisclosed information, she would not have performed the act that was necessary to obtain a better price for her shares than she received, *i.e.*, dissent from the merger, either to impede its consummation or to obtain an appraisal of her shares. Burke had every opportunity in this litigation to state, if she could do so in good faith, that she would have dissented from the acquisition if she had known the facts she contends were misrepresented or concealed. In addition to the

ordinary opportunity to present her case in opposition to Jacoby's motion for summary judgment, she was invited by the court at oral argument to represent, under oath, if she could do so in good faith, that she would not have sold her shares. In response, Burke's affidavit stated that she would have objected to "the allocation of the proceeds of the merger"; but she did not state that she would have dissented, which would have required her to forgo the large profit to be had on her own shares. At no point did Burke suggest that she would have voted against the acquisition had she known any or all of the facts she claims were not disclosed to her. In the district court, she termed the purchase price "in all respects fair and adequate" (Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 54); and in this Court, as noted above, she stated that she still approves of the merger.

The record thus contains no evidence whatever from which a reasonable juror could conclude that any of the alleged misrepresentations or omissions caused Burke any loss. Accordingly, the district court properly dismissed the timely asserted securities claims for lack of evidence of causation.

C. *The Challenge to the Payment for the Class B Shares*

Burke contends that the district court erred in ruling that her remedies for the claim that Jacoby breached his fiduciary duty to Bates shareholders by accepting $40 million for his 30,000 Class B shares were limited to her statutory appraisal right or equitable relief. We disagree.

In ruling that Burke was limited to her appraisal rights, the district court relied on § 623(k) of the New York Business Corporation Law, which provided that

> [t]he enforcement by a shareholder of his right to receive payment for his shares in the manner provided herein [*i.e.*, by an appraisal proceeding] shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership, . . . except that this section shall not exclude the right of such shareholder to bring or maintain an appropriate action to obtain relief on the ground that such corporate action will be or is unlawful or fraudulent as to him.

New York Bus. Corp. Law § 623(k) (McKinney 1986). An "appropriate action" within the meaning of § 623(k) is an action seeking equitable relief, and that type of action and the exercise of the right of appraisal are the dissatisfied stockholder's only avenues of relief. *See Walter J. Schloss Associates v. Arkwin Industries, Inc.*, 61 N.Y.2d 700, 472 N.Y.S.2d 605 (1984) (adopting dissenting opinion of Mangano, J., at the Appellant Division as Court of Appeals opinion), *rev'g* 90 A.D.2d 149, 455 N.Y.S.2d 844 (2d Dep't 1982) ("*Schloss*"); *Breed v. Barton*, 54 N.Y.2d 82, 444 N.Y.S.2d 609 (1981). Money damages are not available except as "ancillary to a grant of traditionally equitable relief." *Schloss*, 90 A.D.2d at 160, 455 N.Y.S.2d at 851. As the *Schloss* court explained:

> An action for damages alone will not lie, since this would allow a dissenting shareholder, by merely alleging fraudulent or unlawful corporate conduct, to seek therein the identical relief available to him in appraisal proceedings. For

> example, where, as here, there is "a forced liquidation or sale of the minority shareholders' stock incident to a merger" . . . the full and proper monetary recovery of the fair value of the dissenters' shares may be obtained in appraisal proceedings in which the discharge of the majority's fiduciary duty to the minority can be weighed in determining fair value. . . . Consequently, an action for damages by a minority shareholder based on the fraudulent or illegal corporate conduct of the majority in discharging its fiduciary duty would be unnecessarily duplicative.

Id. at 161, 455 N.Y.S.2d at 851 (footnote omitted). The equitable relief to which an award of damages could be ancillary means relief other than a so-called request for an accounting that is merely a request for damages in another form. *See id.* at 162 n.6, 455 N.Y.S.2d at 852 n.6 ("The complaint does not seek to have defendant . . . account to plaintiff as representative of the premerger corporation but appears to request an accounting and payment of improperly withheld funds by [defendant] to plaintiff in its individual capacity, revealing plaintiff's real, and in fact stated, intent, i.e., to obtain damages.").

Burke's complaint requested compensatory and punitive damages, together with an accounting that the district court properly viewed as essentially a request for damages. Burke made no attempt to obtain traditionally equitable relief such as a rescission of the merger. As indicated above, she took the position in the district court that the purchase price was "in all respects fair and adequate," and that she was not "dissenting" from the

merger. (Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 54.) Her request for an "accounting," like the request in *Schloss*, was not for equitable relief from Jacoby as to funds belonging to the Company but rather sought funds he received in his individual capacity. *Schloss* forecloses that relief.

Accordingly, we affirm the district court's dismissal of Burke's state-law breach-of-fiduciary-duty claim concerning the redemption of Jacoby's Class B stock.

D. *Other Arguments*

Burke's other challenges to the dismissal of her complaint do not require extended discussion. Her breach-of-contract claim, on which she contends the court should have granted summary judgment in her favor, was properly rejected as a matter of law. That claim relied on the Stockholders Agreement. The stockholders, however, in voting to approve the Saatchi acquisition, explicitly voted to rescind the Stockholders Agreement to coincide with the acquisition. Further, each Class A stockholder, including Burke, acknowledged the termination of the Stockholders Agreement in transmitting his or her Class A shares to consummate the acquisition. Since Burke has disavowed any desire to rescind or dissent from the acquisition, the Stockholders Agreement affords her no basis for a claim.

Burke's complaint that Class A stock was improperly issued to two of Bates's secretaries, who were not "key executive employees" entitled to such stock was also properly dismissed. A schedule attached to that Agreement listed the two secretaries and the other employees

who were to receive Class A shares prior to the closing; we see no indication in the record that if any of the authorized Class A shares had not been issued to the persons listed in the schedule, they were to be issued to others such as Burke. Further, the Acquisition Agreement specified, to the hundredth of a cent, the price to be paid to stockholders for each Class A share; we see no indication that if any of the authorized shares were not issued in accordance with the schedule, the price paid for the already issued shares was to be increased. Burke presented no evidence from which an inference could be drawn that had she been notified of the sales, or had they not been made, she would have received a greater price per share. Thus, we uphold the district court's rulings that the issuance of shares to the secretaries was not material to Burke's vote on the merger, was not material to the surrender of her stock, and did not cause her any injury.

CONCLUSION

We have considered all of Burke's arguments on this appeal and have found in them no basis for reversal. The judgment of the district court is affirmed.

COURT OF APPEALS ORDER DATED
DECEMBER 29, 1992
DENYING REINSTATEMENT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit.

JEAN LORELLE BURKE,

Plaintiff-Appellant,

-against-

ROBERT E. JACOBY,

Defendant-Appellee.

Use short title

91-9148
Docket Number
NOTICE OF MOTION
state type of motion
for reinstatement of cause of action pursuant to P.L. 102-242

* * *

Brief statement of the relief requested: Reinstatement of federal securities cause of action (dismissed by District Court as barred by the statute of limitations) in accordance with P.L. 102-242.

By: *(Signature of attorney)*

/s/ Richard M. Meyer
Signed name must be printed beneath

Richard M. Meyer

Appearing for: *(Name of party)*

Plaintiff-Appellant
Date
January 6, 1992

Appellant or Petitioner:
[x] Plaintiff [ ] Defendant

Appellee or Respondent:
[ ] Plaintiff [ ] Defendant

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is ~~granted~~ denied

As per Opinion filed per (ALK).

FOR THE COURT:

/s/ Richard Alcantara
By: Richard Alcantara

Calendar Clerk
Circuit Judge
December 29, 1992
Date

COURT OF APPEALS ORDER DATED
DECEMBER 29, 1992
DENYING CERTIFICATION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit.

JEAN LORELLE BURKE,

Plaintiff-Appellant,

-against-

ROBERT E. JACOBY,

Defendant-Appellee.

Use short title

91-9148
Docket Number
NOTICE OF MOTION
state type of motion
for Certification of state law questions to New York Court of Appeals

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

MILBERG WEISS BERSHAD SPECTHRIE & LERACH
One Pennsylvania Plaza
New York, NY 10119
(212) 594-5300
Richard M. Meyer, Esq.
Has consent of opposing counsel:

A. been sought? [ ] Yes [x] No

B. been obtained? [ ] Yes [x] No

Has service been effected? [x] Yes [ ] No

Is oral argument desired? [x] Yes [ ] No

(Substantive motions only)

Requested return date: March 17, 1992

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? [x] Yes [ ] No

B. by firm date of argument notice? [x] Yes [ ] No

C. If Yes, enter date: March 4, 1992

Judge or agency whose order is being appealed:

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

KRONISH, LIEB, WEINER & HELLMAN
1345 Avenue of the Americas
New York, NY 10015
(212) 841-6000
John Hartje, Esq.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? [ ] Yes [ ] No

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? [ ] Yes [ ] No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? [ ] Yes [ ] No

Judge or agency whose order is being appealed:

Miriam Goldman Cedarbaum, United States District Court, Southern District of New York

Brief statement of the relief requested: Certification of two questions premised on state law to the New York

Court of Appeals pursuant to N.Y. Rules of Court Section 500.17.

Complete Page 2 of This Form

By: *(Signature of attorney)*

/s/ Richard M. Meyer
Signed name must be printed beneath
Richard M. Meyer

Appearing for: *(Name of party)*

Plaintiff-Appellant
Date
February 28, 1992

Appellant or Petitioner:
[x] Plaintiff [ ] Defendant

Appellee or Respondent:
[ ] Plaintiff [ ] Defendant

ORDER

Kindly leave this space blank
IT IS HEREBY ORDERED that the motion be and it hereby is ~~*granted*~~ *denied*

/s/ Amalya Kearse

/s/ Francis X. Altimari

/s/ Michael A. Telesca
Circuit Judge
12/29/92
Date

DISTRICT COURT DECISION
DATED OCTOBER 10, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEAN LORELLE BURKE,

Plaintiff,

- against -

ROBERT E. JACOBY,

Defendant.

MEMORANDUM OPINION AND ORDER

89 Civ. 1695 (MGC)

APPEARANCES:

MILBERG WEISS BERSHAD SPECTHRIE & LERACH
Attorneys for Plaintiff
One Pennsylvania Plaza
New York, New York 10119

BY: Richard Meyer
Lee S. Shalov

KRONISH, LIEB, WIENER & HELLMAN
Attorneys for Defendant
1345 Avenue of the Americas
New York, New York 10105

BY: John Hartje
A. Kaiper Wilson
Robert S. Shwarts

CEDARBAUM, J.

Plaintiff Jean Lorelle Burke was an employee and stockholder of Ted Bates, Worldwide, Inc. ("Bates") during the period prior to the acquisition of Bates by Saatchi

& Saatchi Company PLC ("Saatchi"). Defendant Robert E. Jacoby was the president, controlling stockholder, and chairman of the board of Bates during the same period.

Burke sues Jacoby for violation of Section 10(b) of the Securities Exchange Act of 1934, breach of fiduciary duty, breach of a stockholders agreement, violations of the New York Business Corporation Law, and common law fraud for his actions in connection with the Bates employee stock option plan and the sale of Bates to Saatchi in August of 1986. The complaint seeks compensatory and punitive damages, in addition to certification of a class, an accounting of the profits received by Jacoby in connection with the acquisition of Bates by Saatchi, and unspecified "redress as provided by law."

Essentially, plaintiff complains that Jacoby breached his fiduciary duty to the other Class A stockholders by structuring the deal for his personal benefit when he served as principal negotiator for Bates on the Saatchi acquisition, and that he failed to disclose the extent of his self-dealing. Plaintiff does not assert that she would have voted against the merger even if she had been aware of the extent of Burke's self-dealing, and even now, she does not wish to undo the merger.

Defendant moves for summary judgment on all counts of the complaint. Plaintiff moves for summary judgment on Count V, breach of the stockholders agreement, and Count VII, violation of Section 605 of the New York Business Corporation Law. For the reasons discussed below, defendant's motion is granted in its entirety, and plaintiff's motion is, accordingly, denied.

FACTS

The following facts are undisputed except where noted. Before it was acquired by Saatchi in August of 1986, Bates was an employee-owned company with two classes of stock. Each share of Class A stock was entitled to one vote; each share of Class B stock was entitled to fifty votes. In August of 1986, Jacoby owned all 30,000 outstanding shares of Bates Class B stock. Ownership of the B shares gave Jacoby voting control of Bates. Burke, an employee of Bates, bought 500 Class A shares in 1980 and 200 Class A shares in 1981, which she owned until she surrendered them at the time of the Saatchi acquisition.

I. The Stockholders Agreement

Both Burke and Jacoby were signatories of the Bates stockholders agreement, dated May 4, 1961, as amended July 23, 1969. The stockholders agreement restricted the ownership, transfer, and price of Bates stock. (P. Ex. 15.) The price of the Class A stock pursuant to the stockholders agreement was calculated by Bates' finance department. At the time of the Saatchi acquisition, the price of the Class A stock under the stockholders agreement was approximately $390 per share.

II. 1982 Stock Option Plan

At the annual meeting of Bates shareholders on May 7, 1982, Jacoby read a speech describing a proposed Class A stock option plan. He said that options for up to 150,000 Class A shares could be awarded under the plan,

that the award of options would dilute the value of the Class A shares, and that initial participation would probably be limited to Jacoby and some executive vice-presidents of Bates. (P. Ex. 33.) At this meeting, the shareholders voted to approve the stock option plan.

A three-member Stock Option Awards Committee was constituted, and on May 12, 1982, Jacoby was awarded 80,000 stock options. The parties disagree as to whether the board or Jacoby selected the members of this Committee and whether Jacoby or the Committee made the decision to award 80,000 options to Jacoby. In 1982, Burke learned that the shareholders had adopted the 1982 stock option plan at the May 7 meeting and that Jacoby had received an award of options, although she did not know how many options he had received or how many had been issued.

III. 1986 Saatchi & Saatchi Acquisition

In 1986, Saatchi acquired Bates by merger of a Saatchi subsidiary into Bates, pursuant to an acquisition agreement dated May 8, 1986, between Saatchi, Regent Acquisition Sub, Inc. (the Saatchi subsidiary), and Bates. (D. Ex. 1.)

The acquisition agreement required Bates to redeem all of its outstanding Class B stock for $40,000,000 and to redeem 22,788 shares of Class A stock for $17,442,120, on or before closing. (D. Ex. 1, § 10.6) Burke had learned in 1980 that Jacoby owned all of the B shares. (D. Rule 3(g) Statement, ¶ 28; P. Response to D. Rule 3(g) Statement, ¶ 0.)

The remaining Class A shares were to be surrendered for a payment of $765.40 per share upon closing and $87.63 per share two years later. (D. Ex. 1, § 2.1) Option holders were to surrender their options in exchange for payment equal to that for shares, less the exercise price of the option. (*Id.*, § 2.4.)

Jacoby described the proposed acquisition to the Bates board of directors at a board meeting on May 8, 1986. The parties disagree as to whether a copy of the acquisition agreement was provided to the directors at that meeting. The directors already knew that Jacoby owned the Class B shares of Bates stock. At the meeting, the board adopted a resolution approving the acquisition agreement and unanimously recommending that the shareholders adopt it.

Lazard Freres & Co. ("Lazard") issued an opinion on the acquisition in a two-page letter dated May 22, 1986, addressed to the Bates board of directors. (D. Ex. 30.)The last paragraph of the opinion letter reads:

> Based upon and subject to the foregoing and upon such other factors as we deem relevant, including our assessment of general economic, market and monetary conditions, it is our opinion that, from a financial point of view, in connection with the Merger, the redemption by Bates of its outstanding shares of Class B common stock is a reasonable action and $40,000,000 is reasonable consideration to pay for such stock.

(D. Ex. 30 at L00058.)

Notice of the May 22, 1986 annual shareholders' meeting was delivered to all shareholders on or before

April 29, 1986. (D. Ex. 7.) The notice did not inform shareholders that the principal purpose of the shareholders' meeting was to vote on the Saatchi acquisition or apprise shareholders of their appraisal rights.

Burke attended the May 22, 1986 shareholders' meeting. She did not object to the notice of the meeting. At the meeting, Jacoby read a speech describing the terms of the proposed Saatchi acquisition. (D. Ex. 7.) The shareholders unanimously approved the Saatchi acquisition at the meeting.

On August 4, 1986, Burke signed a "Letter of Transmittal" surrendering her shares of Class A Bates stock. In this letter, Burke acknowledged that the Bates stockholders agreement "shall be deemed rescinded concurrently with the effective time of the Acquisition." (D. Ex. 14.)

The Saatchi acquisition closed and a certificate of merger was filed with the New York Department of State on August 7, 1986. Jacoby surrendered his B shares to Bates for redemption, and Bates transferred $40 million to Jacoby in payment for those shares on that date. It is disputed whether this redemption took place before the closing.

Burke received payment for her Class A shares according to the acquisition agreement: $765.40 per share after closing and an additional $87.63 per share two years later.

DISCUSSION

A motion for summary judgment will be granted under Federal Rule of Civil procedure 56 if the court determines that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Brady v. Town of Colchester*, 863 F.2d 205, 210 (2d Cir. 1988). In assessing the record, all ambiguities and inferences to be drawn from the underlying facts are to be resolved in favor of the party opposing the motion, and all doubts as to the existence of a genuine issue for trial are to be resolved against the moving party. *Id.; see also Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989). If, however, after discovery, a nonmoving party fails to make a showing sufficient to establish the existence of an element essential to one of its claims, and on which that party will bear the burden of proof at trial, summary judgment may be granted on that claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In such a situation, there can be no "genuine issue as to any material fact" because a failure of proof on an essential element of a claim of a nonmoving party necessarily renders all other facts immaterial. *Id.* at 322-23.

I. Count One: Federal Securities Fraud

Burke claims that Jacoby made material misrepresentations and omissions in connection with both the 1982 stock option plan and the Saatchi acquisition, in violation of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j). I treat each of Burke's allegations of misrepresentation in turn.

A. Stock Option Plan

Burke alleges that Jacoby violated Section 10(b) by failing to disclose to shareholders before they approved the 1982 stock option plan that he already planned to award himself 80,000 options. Although plaintiff makes no showing as to how this failure to disclose in 1982 was "in connection with the purchase or sale of any security" as is required by Rule 10b-5, in any event, this claim is time-barred.

In *Ceres Partners v. GEL Assoc.*, 918 F.2d 349 (2d Cir. 1990), the Second Circuit rejected its previously established rule as to the appropriate statute of limitations governing claims alleging violations of Section 10(b), and adopted a uniform federal limitation that such actions must be commenced within one year after discovery and within three years after the occurrence of a violation. In *Welch v. Cadre Capital*, 923 F.2d 989 (2d Cir.), *cert. granted, judgment vacated, and remanded sub nom. Northwest Sav. Bank. PaSA v. Welch*, 111 S. Ct. 2882 (1991), decided on January 22, 1991, the Second Circuit held that the new *Ceres* limitation period should not be applied retroactively.

On September 16, 1991, the Supreme Court adopted as its new rule the same uniform federal limitation period as that chosen by the Second Circuit. *Lampf, Pelva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991). In the *Lampf* case, the Supreme Court, unlike the Second Circuit, applied the new limitation period retroactively to bar the claim of the plaintiff. Although the opinion of the Court does not explicitly address the issue of retroactivity, in her dissenting opinion, Justice O'Connor

expressly draws attention to the Court's retroactive application of the new limitation period. *See Lampf*, 111 S. Ct. at 2785-88 (O'Connor, J., dissenting).

In a case decided by the Supreme Court on the very same day as *Lampf*, September 16, 1991, the Court held that when a court applies a new rule of civil law retroactively in the case in which the new rule of civil law retroactively in the case in which the new rule is announced, the new rule must also be applied retroactively in all similar pending cases. *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991). The conflicting Second Circuit case, *Welch*, has been vacated and remanded by the Supreme Court for reconsideration in light of *Lampf* and *Beam*.

The complaint in this case was filed in 1989. Jacoby's failure to disclose his intention to award himself 80,000 stock options is alleged to have occurred in 1982. Under the combined teachings of *Lampf* and *Beam*, that claim is time-barred. Accordingly, summary judgment is granted to defendant on this portion of Count I.

B. Saatchi Acquisition

Burke alleges that Jacoby failed to make material disclosures in connection with the acquisition of the agency by Saatchi. Specifically, Burke alleges that Jacoby failed to disclose: (1) that he owned all of the Class B shares and was "secreting away $40 million towards 'control premium' "; (2) how the $40 million redemption price for the Class B stock was arrived at; (3) that Lazard had called the price "reasonable consideration," not a "fair price"; (4) that Lazard was willing "to give Jacoby any

opinion he wanted"; (5) that Jacoby would receive $49 million profit on his 80,000 options; (6) that Jacoby had arranged for two secretaries to buy stock shortly before the acquisition; and (7) that a third party had made a better offer for Bates.

1. Ownership and Price of Class B Shares

Burke alleges that Jacoby did not disclose to the shareholders at the May 22, 1986 meeting that he owned all of the B shares and was "secreting away $40 million towards 'control premium.'" (Amended Complaint, ¶ 44.) The undisputed text of Jacoby's speech at that meeting shows that he disclosed that the "B shares . . . will be redeemed at or prior to closing for $40,000,000." (D. Ex. 7.) In addition, Burke does not dispute that she already knew before the May 22, 1986 shareholders' meeting that Jacoby owned all of the B shares. (D. Rule 3(g) Statement, ¶ 28; P. Response to D. Rule 3(g) Statement, ¶ 0.) Because Burke already had actual knowledge of this fact, she may not recover under Section 10(b) for its omission. *Mayer v. Oil Field Systems Corp.*, 803 F.2d 749, 755 (2d Cir. 1986). Therefore, Jacoby's motion for summary judgment is granted as to this portion of the Section 10(b) claim.

2. Allocation Method

Burke argues in her memorandum in opposition to Jacoby's motion for summary judgment that Jacoby did not disclose to the shareholders how the allocation of $40 million for the Class B shares was arrived at. Because she does not mention this omission in her narrative-style

amended complaint, I do not consider it a part of her claim of Section 10(b) securities fraud.

3. Lazard Opinion

Burke alleges that Jacoby's statement at the May 22, 1986 stockholders' meeting that Lazard had " 'stated that the price to be paid for Class B shares . . . is a fair one' " was false and misleading. (Amended Complaint, ¶ 45.) The Lazard opinion actually stated: "[T]he redemption by Bates of its outstanding shares of Class B common stock is a reasonable action and $40,000,000 is reasonable consideration to pay for such stock." (D. Ex. 30 at L00058.)

Jacoby argues that his characterization of Lazard's opinion was accurate, and that even if he mischaracterized the Lazard opinion, Burke has not shown she relied upon it in any way.

Burke's Section 10(b) claim based on Jacoby's statement that Lazard had said that $40 million was a fair price for the Class B shares is defective because of the absence of any reliance by Burke upon this statement. A Section 10(b) securities fraud claim cannot succeed unless the misrepresentation complained of was at least a "but for" cause of the transaction in question. *See Wilson v. Ruffa & Hanover*, 844 F.2d 81, 85-86 (2d Cir. 1988), *aff'd on rehearing sub nom. Wilson v. Saintine Exploration & Drilling Corp.*, 872 F.2d 1124 (2d Cir. 1984).

At the oral argument of this motion, I invited Burke's counsel to submit evidence, in the form of an affidavit from Burke, that she relied upon Jacoby's description of

Lazard's opinion in deciding to sell her shares. (*See* Hearing Tr. at 19-20.) In response, Burke submitted an affidavit stating only: "Had I known of the falsity of that representation, I would have objected to the allocation of the proceeds of the merger on the terms then set forth." She does not state that she would have dissented from the merger. Thus, since there is no evidence of loss causation, an essential element of a claim of fraud in connection with the purchase or sale of securities, Jacoby's motion for summary judgment on this part of the Section 10(b) claim is granted.

4. Impropriety by Lazard

Burke argues in her memorandum in opposition to Jacoby's motion for summary judgment that Jacoby did not disclose to the shareholders that Lazard was willing to give Jacoby any opinion he wanted. Because she does not allege this omission in her narrative-style amended complaint, I do not consider it a part of her claim of Section 10(b) securities fraud.

5. Jacoby's Options

Burke alleges that Jacoby failed to disclose how many options he owned or what his total profit on options would be.

At the time of the acquisition, Jacoby owned 80,000 options of Class A stock, or the lion's share of the 110,000 outstanding options. (P. Ex. 4 at 8; P. Ex. 36.) As a result of the acquisition, Jacoby realized a $49 million profit on the

options, which was even more than he received for either his Class A or his Class B stock.

At the 1982 shareholders' meeting, Jacoby disclosed that he was going to receive options. (P. Ex. 33.) In his remarks at the May 22, 1986 shareholders' meeting, it is undisputed that Jacoby disclosed the price option holders would receive. He did not, however, disclose the number of options he owned or the extent of his potential profit.

The parties disagree about whether plaintiff knew at the time of the acquisition how many options were owned by Jacoby. A news article from *Advertising Age* dated May 12, 1986 that plaintiff saved and produced at her deposition states that Jacoby owned 75,000. (D. Ex. 56.) (In fact, Jacoby had 80,000 when the deal was consummated.) Plaintiff claims, however, that although she read the first paragraph of the *Advertising Age* article, she did not read the portion describing Jacoby's stock and option holdings or the profit he stood to gain from the Saatchi acquisition. (Burke Dep. at 387-91.)

Rule 10b-5 provides in pertinent part that it is unlawful "to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5. The duty to disclose under rule 10b-5 is limited to facts necessary to prevent shareholders from being misled. *Basic, Inc. v. Levinson*, 485 U.S. 224, 237 (1988); *Levine v. NL Industries, Inc.*, 717 F. Supp. 252, 254 (S.D.N.Y.), *later proceeding*, 720 F. Supp. 305 (S.D.N.Y. 1989), *aff'd*, 926 F.2d 199 (2d Cir. 1991). Here Jacoby, as the majority shareholder and negotiator of the Saatchi deal, owed a duty to the minority shareholders to disclose the

material facts necessary to prevent them from being misled as to the nature and terms of the acquisition.

For an omitted fact to be material under Rule 10b-5, it must be shown that there is a substantial likelihood that a reasonable investor would have considered it significant. *Basic*, 485 U.S. at 232. In the case of the Saatchi acquisition, a reasonable Class A shareholder might have considered the number of options owned by Jacoby and the extent of his potential profit on them significant in view of the fact that it was Jacoby who negotiated the terms of the merger on behalf of Bates.

Plaintiff, however, has never stated that she would have voted against the merger even if she had been apprised of Jacoby's option holdings or potential profit on them, despite my invitation for her to do so. (*See* Hearing Tr. at 19-20; Burke Aff.) On the contrary, she has maintained the position that the total sale price was an "excellent" one (P. Mem. in Opp'n to Summ. J. at 1) and that she is not " 'dissenting from' " the merger (*id.* at 54).

In order to recover under Section 10(b), a plaintiff must establish that the misrepresentations complained of caused the injury suffered. *Bennett v. United States Trust Co.*, 770 F.2d 308, 313 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986). Here, although there may be a genuine issue of material fact as to whether the omission plaintiff complains of was material and misleading, there is no evidence that it affected her vote or her desire to sell shares. Thus, the misrepresentation cannot be said to have caused the alleged injury. Since plaintiff has failed to come forth with evidence of an essential element of her

claim regarding Jacoby's stock option holdings, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), defendant's motion for summary judgment as to this portion of Count I must be granted.

6. Sale of Stock to Secretaries

Burke alleges that Jacoby failed to disclose that he had arranged for his personal friends to buy stock shortly before the Saatchi acquisition. (Amended Complaint, ¶ 44.) This allegation seems to refer to sales totalling 3,500 shares of stock to two secretaries at Bates. (*Id.*, ¶¶ 40-42.) Burke alleges that these sales of stock were improper because the two secretaries could not afford to buy the stock and because they were not executives even though Jacoby had written, in a memorandum dated February 4, 1986, that stock would be offered only to people who "will make a major contribution to the success of the company and who can afford the substantial financial burden involved."

The acquisition agreement allowed some twenty employees to purchase 30,000 shares of Class A stock before closing. (D. Ex. 1, § 6.2; D. Ex. 2.) About twenty did so. Under a board resolution, Jacoby had authority to approve issuance of stock, and the stockholders agreement allowed any full-time employee to buy stock. (D. Ex. 35.)

Jacoby disclosed both the total price for the Class A shares and the price for each Class A share. The fact that Jacoby approved issuance of stock to these two individuals shortly before closing did not affect the price Burke was told she would receive for her shares, and was not

material to Burke's vote on the merger or surrender of her stock. Jacoby's motion for summary judgment on this part of Count One is therefore granted.

7. Better Offer by Third Party

Burke alleges, in Paragraph 45 of the Complaint, that Jacoby failed to disclose a better acquisition offer by a third party. Donald M. Zuckert affirms that "Interpublic" offered to buy Bates via "convertible stock with a guaranteed sale value . . . of $500 million." Thus, although she does not address it in her Rule 3(g) statement, plaintiff has proffered some evidence that such an offer existed.

Again, however, plaintiff has made no showing that she would have voted against the merger had she been in possession of the information she claims was wrongfully withheld. Thus, plaintiff has failed to make the requisite showing of loss causation to sustain her Section 10(b) claim. Defendant's motion for summary judgment on this portion of Count I must therefore be granted.

II. Count Two: Breach of Fiduciary Duty

Burke alleges in Count Two of her amended complaint that Jacoby breached his fiduciary duty to Class A stockholders by negotiating a control premium of $40 million for his own Class B stock while simultaneously negotiating on behalf of the Class A stockholders.

Jacoby moves for summary judgment on this count on the ground that New York, Business Corporation Law § 623(k) limits Burke's remedies to appraisal and equitable relief. Section 623(k) reads:

> The enforcement by a shareholder of his right to receive payment for his shares in the manner provided herein shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership, except as provided in paragraph (e), and except that this section shall not exclude the right of such shareholder to bring or maintain an appropriate action to obtain relief on the ground that such corporate action will be or is unlawful or fraudulent as to him.

In *Breed v. Barton*, 54 N.Y.2d 82, 429 N.E.2d 128, 444 N.Y.S.2d 609 (1981), "appropriate action" is defined as an action in which the shareholder seeks equitable relief.

Jacoby relies on *Walter J. Schloss Associates v. Arkwin Indus.*, 61 N.Y.2d 700, 460 N.E.2d 1090, 472 N.Y.S.2d 605 (1984), *rev'g* 90 A.D.2d 149, 455 N.Y.S.2d 844 (2d Dep't 1982) (adopting dissent of Justice Mangano of Appellate Division as Court of Appeals opinion) for the proposition that a shareholder who objects to the terms of a merger is confined to appraisal and equitable relief. In *Schloss*, suit by a dissenting minority shareholder for damages for fraud and fiduciary breach was held to be barred by Section 623(k). Thus, as defendant points out, New York law limits an aggrieved shareholder's remedy to an appraisal proceeding unless the merger was "unlawful or fraudulent as to that shareholder, in which event an action for equitable relief is authorized." *Alpert v. 28 Williams St. Corp.*, 63 N.Y. 2d 557, 473 N.E.2d 19, 483 N.Y.S.2d 667, 673 (1984); *see also* N.Y. Bus. Corp. Law § 623(k).

Burke argues that Section 623(k) is inapplicable to her claim because she is not dissenting from the merger

itself, but from the allocation of $40 million of the total purchase price to the Class B shares. Burke's argument fails, however, because the allocation of the proceeds of the acquisition among the two classes of stock and stock options was an essential term of the merger. Plaintiff cannot successfully assert that she approves of the overall merger while simultaneously rejecting one of its key components as a means of circumventing Section 623.

Moreover, because Burke is seeking primarily compensatory and punitive damages rather than an equitable remedy such as rescission, she cannot invoke the (k) exception to New York's statutory appraisal scheme. *Alpert*, 483 N.Y.S.2d at 673 & n.4. Defendant's motion for summary judgment must therefore be granted as to Count Two.

III. Count Three: Breach of Fiduciary Duty

Burke alleges in Count Three that the award by the Option Awards Committee of 80,000 options to Jacoby constituted a breach of fiduciary duty by Jacoby. She alleges that Jacoby knew that he would receive 80,000 stock options before he presented the plan to the shareholders in 1982, that the Stock Option Awards Committee was a sham, and that the award of the 80,000 options was improper because Jacoby lacked the financial ability to exercise the options. Jacoby argues that the award was entirely proper and that the claim is time-barred in any event.

The parties agree that the applicable New York limitations period for a claim of breach of fiduciary duty is

six years. N.Y. C.P.L.R. § 213(1). Both the adoption of the stock option plan and the award of the options occurred in 1982. Burke learned of both in 1982. Burke concedes that this count is time-barred unless the statute of limitations is subject to equitable estoppel or tolling. (Hearing Tr. at 44.)

Under New York law, a defendant who induces a plaintiff to refrain from commencing an action, either by false statements of fact or by active concealment of facts, may be estopped from pleading the statute of limitations as a defense. *See Jordan v. Ford Motor Co.*, 73 A.D.2d 422, 426 N.Y.S.2d 359 (4th Dep't 1980). If the delay in starting the action is based on a misrepresentation by the defendant, the plaintiff must allege that justified reliance on it was the reason for the delay. Burke makes no allegation that she delayed her action in reliance on any misrepresentation by Jacoby. Nor does she allege or argue that active concealment by Jacoby of his conduct with regard to the 1982 stock option plan prevented her from discovering that she had a claim against him. She argues only that she was not aware of the facts underlying her claim until 1986. This is insufficient to invoke equitable estoppel or tolling of the statute of limitations. Therefore, Jacoby's motion for summary judgment on Count Three is granted.

IV. Count Four: Breach of Fiduciary Duty

Burke alleges in Count four that Jacoby breached his fiduciary duty to her by authorizing the sale of stock to people he chose shortly before the Saatchi acquisition. It is undisputed that Jacoby authorized the sale of Class A

stock to two secretaries before the acquisition. The acquisition agreement allowed some twenty employees to purchase 30,000 shares before closing. (D. Ex. 1, § 6.2; D. Ex. 2.) About twenty did so. Under a Board resolution, Jacoby had authority to approve issuance of stock, and the stockholders agreement allowed any full-time employee to buy stock. (D. Ex. 35.)

Burke argues that the secretaries were not authorized to buy the stock because of a Jacoby memo that only those making "a major contribution to the success of the company" could buy stock, and because their salaries could not support the purchases. Although Jacoby authorized the sale of stock to various employees pursuant to the authority granted to him by the board of directors, Burke complains only abut sales to these two employees. But Burke has shown no diminution of the value of her stock from the issuance of stock to these two employees as distinguished from two other employees, or that she attempted to purchase the stock and was refused. Thus she proffers no evidence of actionable injury. Therefore, Jacoby's motion for summary judgment on this count is granted.

V. Count Five: Breach of Stockholders Agreement

In Count Five, Burke alleges that Jacoby breached the stockholders agreement by causing Bates to redeem his Class B stock for $40 million. Burke alleges that the stockholders agreement required stockholders desiring to sell their shares to notify Bates, and that the agreement gave Bates the right of first refusal at the book value of the stock. She also alleges that under the agreement the

book value of the Class B stock was fifty cents per share, or $15,000 for all 30,000 Class B shares.

Both Burke and Jacoby have moved for summary judgment on this count. In the letter of transmittal that Burke signed on August 4, 1986, Burke acknowledged that the stockholders agreement shall be deemed rescinded at the effective date of the acquisition. Thus, she knowingly gave up any claim under the stockholders agreement. Accordingly, defendant's motion for summary judgment on Count Five is granted, and plaintiff's motion for summary judgment on this count is denied.

VI. Count Six: New York Business Corporation Law § 609

In Count Six Burke alleges that Jacoby failed to disclose material facts in the proxy and thus violated New York Business Corporation Law § 609. This count seeks unspecified "redress as provided by law." Burke attended the shareholders' meeting and did not vote by proxy. Defendant was granted summary judgment on Count Six at the oral argument of this motion.

VII. Count Seven: New York Business Corporation Law § 605

Burke claims under New York Business Corporation Law § 605 that the notice of the shareholders' meeting was deficient in that it failed to advise shareholders of the purpose of the meeting and the rights guaranteed them by New York Business Corporation Law § 623. But Burke waived her rights under Section 605 when she

attended the meeting and failed to protest the lack of proper notice by the end of the meeting. *See* New York Business Corporation Law § 606 ("The attendance of any shareholder at a meeting, in person or by proxy, without protesting prior to the conclusion of the meeting the lack of notice of such meeting, shall constitute a waiver of notice by him."). Therefore, Burke's motion for summary judgment on this count is denied, and Jacoby's motion for summary judgment on this count is granted.

VIII. Count Eight: Common Law Fraud

Although this count is not pleaded with requisite particularity, it appears to allege the same fraud asserted in Count One, and is defective for the same reasons. Detrimental reliance is an essential element of common law fraud in New York. *East End Owners Corp. v. Roc-East End Associates*, 128 A.D.2d 366, 516 N.Y.S.2d 663, 665 (1st Dep't 1987). Moreover, as discussed above, plaintiff is barred from seeking damages in connection with the sale of her Bates stock by New York Business Law § 623. Therefore, Jacoby's motion for summary judgment on Count Eight is granted.

CONCLUSION

For the foregoing reasons, Burke's motion for summary judgment on Counts Five and Seven is denied. Jacoby's motion for summary judgment is granted as to all counts of the complaint.

SO ORDERED.

Dated: New York, New York
October 10, 1991

/s/ Miriam Goldman Cedarbaum
MIRIAM GOLDMAN CEDARBAUM
UNITED STATES
DISTRICT JUDGE

DISTRICT COURT JUDGMENT
DATED OCTOBER 17, 1991

DOC #54

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEAN LORELLE BURKE, Plaintiff, -against- ROBERT E. JACOBY, Defendant.	:	89 *CIVIL* 1695 (MGC) *JUDGMENT*

Defendant having moved for summary judgment on all counts of the complaint, plaintiff having moved for summary judgment on Count V, breach of the stockholders agreement, and Count VII, violation of Section 605 of the New York Business Corporation Law, and the said motions having come before the Honorable MIRIAM GOLDMAN CEDARBAUM, U.S.D.J., and the Court thereafter on October 11, 1991, having handed down its memorandum opinion and order (#68769); denying Burke's motion for summary judgment on Counts Five and Seven, and granting Jacoby's motion for summary judgment as to all counts of the complaint, it is,

ORDERED, ADJUDGED AND DECREED: that plaintiff's motion for summary judgment on Counts Five and Seven of the complaint be and it is hereby denied, and it is further,

ORDERED, that defendant's motion for summary judgment as to all counts of the complaint be and it is hereby granted, and it is further,

ORDERED, that the complaint be and it is hereby dismissed for the reasons stated in the Court's Memorandum Opinion and Order, dated October 11, 1991.

Dated: NEW YORK, NEW YORK
October 17, 1991

/s/ James M. Illegible
Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 10-18-91.

AFFIDAVIT OF JEAN LORELLE BURKE

DATED MAY 30, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEAN LORELLE BURKE,	:	
Plaintiff,	:	89 Civ. 1695 (MGC)
- against -	:	
ROBERT E. JACOBY,	:	
Defendant.	:	

STATE OF CONNECTICUT)
) ss.:
COUNTY OF LITCHFIELD)

Jean Lorelle Burke, being duly sworn, deposes and says:

I am the plaintiff in the above entitled matter and I submit this affidavit in connection with the cross-motions for summary judgment now pending before the Court.

I was present in the Courtroom on May 24, 1991 for the entire argument on the motions for summary judgment. I can assure the Court of the following:

1. On May 22, 1986, the date of the stockholders meeting in connection with the acquisition of Bates by Saatchi & Saatchi, I did not know the number of options possessed by defendant Jacoby. I was greatly surprised to

learn much later that he owned the huge amount of 80,000 options.

2. Nor did I know at that time that Jacoby had accorded the right to purchase A shares at book value to Jennifer Van Liew (2,500 shares) and Eileen Drgon (1,000 shares).

3. As I testified at my deposition, I recall Jacoby stating that he had an opinion from a respectable investment banking firm that $40 million was a fair price for the redemption of the B stock. I did rely on Mr. Jacoby's representation and therefore voted as he recommended. Had I known of the falsity of that representation, I would have objected to the allocation of the proceeds of the merger on the terms then set forth.

/s/ Jean Lorelle Burke
Jean Lorelle Burke

Sworn to before me this
30th day of May, 1991

/s/ Clara Dantona
Notary Public

CLARA DANTONA
Notary Public-State of Connecticut
MY COMM. EXPIRES MARCH 31, 1993

EXCERPTS FROM AFFIDAVIT OF LARRY LIGHT
DATED APRIL 10, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEAN LORELLE BURKE,	:	89 Civ. 1695 (MGC)
Plaintiff,	:	
-against-	:	
ROBERT E. JACOBY,	:	
Defendant.	:	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF LARRY LIGHT

[Director of Ted Bates]

LARRY LIGHT, being duly sworn, deposes and says, as follows:

* * *

10. I have a distinct recollection of believing the B share redemption to be improper and contrary to my understanding of what the B shares represented (that is, voting and *not* equity stock). In fact, when Jacoby interviewed me in 1981, he told me that the B shares were limited in value to $.50 per share. However, I did not object to the B share redemption upon being advised by

Jacoby that a supposedly independent investment banking firm was involved in the process and had opined the redemption price to be "fair." I am now told by plaintiff's counsel that this in fact was not the case, and that Lazard denied opining that the $40 million price paid to Jacoby was "fair" (instead, being "reasonable consideration"). I believe that had I known the true facts, I would have objected to Jacoby's diversion of these monies for his own benefit which monies should rightfully have been distributed to the Company's shareholders. I would also note that the directors never received a copy of the supposed "fairness opinion" nor did the Board at any time authorize the retention of Lazard or the payment to Lazard for the services it apparently rendered (Ted Bates' By-Laws required Jacoby to have Board approval for all expenditures over $100,000).

11. I believe the $40 million payment to Jacoby was improper and a fraud on the Company's shareholders. Since the organization of Ted Bates, the B shares have been "non equity" shares and have always been sold and carried on the books of Ted Bates at their book value price: that is, $.50 per share. Thus, Jacoby was neither authorized nor entitled to receive anything but the book value of the B shares in connection with the sale of the Company. Jacoby's diversion of these monies for his own personal enrichment in my opinion violated his fiduciary obligations to the Company and the Company's shareholders.

12. I also recall being shocked to learn later that Jacoby had arranged for two secretaries of the Company (Jennifer Van Liew and Eileen Drgon) to receive a substantial number of shares of the Company. Neither of

these persons financially or otherwise qualified to purchase Ted Bates shares. Moreover, the Board was not asked to and did not ratify the sale of shares to either Van Liew or Drgon.

/s/ Larry Light
Larry Light

Sworn to before me this
10th day of April, 1991.

/s/ [illegible]
Notary Public

EXCERPTS FROM AFFIDAVIT OF
DONALD M. ZUCKERT
DATED APRIL 10, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEAN LORELLE BURKE,	:	89 Civ. 1695 (MGC)
Plaintiff,	:	
-against-	:	
ROBERT E. JACOBY,	:	
Defendant.	:	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF DONALD M. ZUCKERT

[Director of Ted Bates and
Chief Operating Officer of
Ted Bates Advertising/New York]

DONALD M. ZUCKERT, being duly sworn, deposes and says, as follows:

* * *

18. Also at the Board meeting, Jacoby advised the directors that Lazard had provided a "fairness opinion" in connection with the $40 million redemption of Jacoby's B shares. The directors never received a copy of the supposed "fairness opinion" nor did the Board at any time authorize the retention of Lazard or the payment to Lazard of $225,000 for the services it apparently rendered (Ted Bates' By-Laws required Jacoby to have Board approval for all expenditures over $100,000).

19. I have been informed by plaintiff's counsel that Lazard did not in fact provide a "fairness opinion" as Jacoby advised the Board on May 8, 1986. Instead, Lazard apparently opined that the $40 million payment to Jacoby was "reasonable consideration" and expressly denied opining that the $40 million payment price was "fair." Jacoby's misrepresentation of this fact was repeated on May 22, 1986 when he solicited shareholder approval for the Saatchi Acquisition.

* * *

22. . . . had I known the true facts concerning Jacoby's role and participation in the Saatchi Acquisition together with his approval of share sales to Van Liew and Drgon, I would have advised the other directors that

Jacoby's actions were fundamentally improper and a breach of his fiduciary duties and obligations.

EXCERPTS FROM DEPOSITION TESTIMONY OF ALI E. WAMBOLD, GENERAL PARTNER, LAZARD FRERES & CO.

Q. Do you have the opinion letter in front of you?

A. Yes.

Q. Would you turn to the last page.

Did you personally conclude that $40 million was a fair price to pay for the Class B common stock?

MR. ROWE: That has been asked and answered, but I will let him respond to it again.

A. No, I concluded or the firm concluded what is written there.

* * *

Q. I didn't ask whether you agreed with that conclusion. I asked you whether you concluded that $40 million was the reasonable value of the Class B stock.

A. Well, I could tell you one more time that when the firm is acting in an opinion, it is the firm's conclusion which incorporates the beliefs, recommendations, whatever, of the people who work on the matter, A. So any conclusion here is the firm's conclusion.

And B, what it says is $40 million is reasonable to pay for such stock. That is a different notion than value.

EXCERPTS FROM DEPOSITION TESTIMONY OF RESPONDENT ROBERT E. JACOBY

Well, the Saatchis didn't really care how the money was divved up, you understand, we agreed on a number, that number was $507.4 million for the company and they did not care how it was, they wanted to make sure they got all the shares back.

STATUTES AND RULES INVOLVED

Securities Exchange Act of 1934, 15 U.S.C. § 78j:

SEC. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * *

Rule 10b-5, 17 C.F.R. 240.10b-5:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange:

(1) To employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

* * *

New York Business Corporation Law, § 605:

(a) Whenever under the provisions of this chapter shareholders are required or permitted to take any action at a meeting, written notice shall be given stating the place, date and hour of the meeting and, unless it is the annual meeting, indicating that it is being issued by or at the direction of the person or persons calling the meeting. Notice of a special meeting shall also state the purpose or purposes for which the meeting is called. If, at any meeting, action is proposed to be taken which would, if taken, entitle shareholders fulfilling the requirements of section 623 (Procedure to enforce shareholder's right to receive payment for shares) to receive payment for their shares, the notice of such meeting shall include a statement of that purpose and to that effect and shall be accompanied by a copy of section 623 or an outline of its material terms. A copy of the notice of any meeting shall be given, personally or by mail, not less than ten nor more than fifty days before the date of the meeting, to each shareholder entitled to vote at such meeting. If mailed, such notice is given when deposited in the United States mail, with postage thereon prepaid, directed to the shareholder at his address as it appears on the record of shareholders,

or, if he shall have filed with the secretary of the corporation a written request that notices to him be mailed to some other address, then directed to him at such other address. An affidavit of the secretary or other person giving the notice or of a transfer agent of the corporation that the notice required by this section has been given shall, in the absence of fraud, be prima facie evidence of the facts therein stated.

(b) When a meeting is adjourned to another time or place, it shall not be necessary, unless the by-laws require otherwise, to give any notice of the adjourned meeting if the time and place to which the meeting is adjourned are announced at the meeting at which the adjournment is taken, and at the adjourned meeting any business may be transacted that might have been transacted on the original date of the meeting. However, if after the adjournment the board fixes a new record date for the adjourned meeting, a notice of the adjourned meeting shall be given to each shareholder of record on the new record date entitled to notice under paragraph (a).

NEW YORK RULES OF COURT
COURT OF APPEALS

§ 500.17 Discretionary Proceedings to Review Certified Questions From Federal Courts and Other Courts of Last Resort

(a) Whenever it appears to the Supreme Court of the United States, any United States Court of appeals, or a court of last resort of any other state that determinative questions of New York law are involved in a cause pending before it for which there is no controlling precedent of

the Court of Appeals, such court may certify the dispositive questions of law to the Court of Appeals.

(b) The certifying court shall prepare a certificate which shall contain the caption of the case, a statement of facts setting forth the nature of the cause and the circumstances out of which the questions of New York law arise, and the questions of New York law, not controlled by precedent, which may be determinative, together with a statement as to why the issue should be addressed in the Court of Appeals at this time.

(c) The certificate, certified by the Clerk of the certifying court under its official seal, together with the original or copies of all relevant portions of the record and other papers before the certifying court, as it may direct, shall be filed with the Clerk of the Court of Appeals.

(d) The Court of Appeals, on its own motion, will examine the merits presented by the certified question, first to determine whether to accept the certification, and second, the review procedure to be followed in determining the merits.

(e) The Court shall instruct the Clerk to request any additional papers which it requires for its review. Time periods for filing of papers and calendaring of any hearing directed by the Court shall be on notice given by the Clerk of the Court.

(f) If the constitutionality of an act of the Legislature of this State, affecting the public interest is involved in a certification to which the State of New York or an agency is not a party, the Clerk of the Court of Appeals

shall notify the Attorney General in accordance with the provisions of Executive Law § 71.

(g) When a determination is rendered by the Court of Appeals with respect to the questions certified, it shall be sent by the Clerk of the Court of Appeals to the certifying court.

No. 92-1490

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JEAN LORELLE BURKE,

Petitioner,

—v.—

ROBERT E. JACOBY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JOHN HARTJE*
A. KAIPER WILSON
ROBERT S. SHWARTS

KRONISH, LIEB, WEINER & HELLMAN
1345 Avenue of the Americas
New York, New York 10105-0202
(212) 841-6000

Attorneys for Respondent Robert E. Jacoby

**Counsel of Record*

April 12, 1993

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Second Circuit follow this Court's applicable decisions when it concluded that a claim for violation of Section 10(b) of the Securities Exchange Act of 1934 cannot survive a motion for summary judgment where there is no evidence that the plaintiff suffered any loss as a result of alleged misrepresentations and omissions?

2. Is there any basis for this Court to exercise its power of supervision to require the Second Circuit to certify a question of settled law to New York State's highest appellate court?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1490

JEAN LORELLE BURKE,

Petitioner,

—v.—

ROBERT E. JACOBY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 981 F.2d 1372. For the Court's convenience, a copy of the slip opinion is included in the Appendix to this Brief, beginning at page A1.[1]

1 Citations to the Appendix are in the form "A____."

STATUTES INVOLVED

In addition to the statutes and regulations identified in the Petition for a Writ of Certiorari, dated March 12, 1993 (the "Petition"), this case involves New York Business Corporation Law Section 623, a copy of which is included in the Appendix to this Brief, beginning at page A19.

STATEMENT OF THE CASE

Factual Background[2]

Until August 1986, Ted Bates Worldwide, Inc. (Bates) was an employee-owned advertising company. Respondent Robert E. Jacoby was Bates' President, Chairman of the Board and Chief Executive Officer, positions he had held since the early 1970's. Petitioner was a vice president of the company.

Bates had two classes of stock—Class A and Class B. Bates' CEO had unrestricted authority to decide which employees could purchase Bates' Class A shares. A Stockholders Agreement otherwise restricted the transfer of the Class A shares. Those shares could be resold only to Bates, or to designated employees, at "book value," a price calculated by dividing Bates' net asset value by the number of Class A shares outstanding. In August, 1986, petitioner Jean Lorelle Burke owned 700 shares of Class A stock. Jacoby owned 27,750 Class A shares. He also held options covering an additional 80,000 Class A shares. A shareholder resolution adopted in 1982 had authorized those options. A3.

Jacoby also owned all 30,000 shares of Bates' Class B stock. The Stockholders Agreement restricted transfer of the Class B stock as well, fixing the resale price at 50¢ per share.

---

2 This description of the facts and of petitioner's lawsuit tracks the description provided by the United States Court of Appeals for the Second Circuit. *See* A3-A8.

Under Bates' Certificate of Incorporation, each Class A share had one vote. Fewer than 500,000 Class A shares were outstanding in August 1986. Each of the 30,000 Class B shares had 50 votes. Jacoby, with more than 1,500,000 votes, could exercise voting control of the company.

In August 1986, Saatchi & Saatchi Company, PLC (Saatchi) acquired Bates by merger. The Acquisition Agreement set the terms of the merger, providing that: (i) before the closing, Bates would redeem 22,788 Class A shares for $17.4 million and would redeem Jacoby's 30,000 Class B shares for $40 million; (ii) prior to the closing, Bates could sell 30,000 additional Class A shares to 23 named employees; and (iii) Saatchi would pay a total of $450 million in cash to persons who, at the time of the closing, held Class A shares or options. Each holder of Class A stock would receive approximately $853.00 per share: $765.3953 per share upon closing, and an additional $87.6286 per share two years later. Holders of stock options would receive the same price per share, minus the exercise price of the option. The Acquisition Agreement provided appraisal rights for stockholders who dissented. A4.

On May 8, 1986, Bates' Board of Directors unanimously approved the Acquisition Agreement and recommended that the shareholders adopt it at the upcoming shareholders meeting. Petitioner learned of the proposed acquisition and merger shortly after the Board approved it. She was expecting the acquisition to be presented at the upcoming shareholders meeting, and was hoping to make a lot of money on the deal.

A "full house" attended the shareholders meeting on May 22, 1986. Petitioner testified that the shareholders were "full of anticipation and hope"; the atmosphere was one of "tailwagging excitement."

At the meeting, Jacoby, as Chairman of Bates' Board, presented the terms of the Acquisition Agreement, as described above, to the shareholders.

Jacoby read from a script, drafted and approved in advance by Bates' legal counsel and financial officers. Jacoby noted that, if Saatchi did not acquire Bates, the book value of the Class A stock at the end of the fiscal year would be $390 per share. Slides, prepared by Bates' Finance Department and projected onto a large screen, accurately illustrated the terms of the proposed merger. When the slide showing the Class A price of $853 per share appeared on the screen, the shareholders, including Burke, applauded. A4. With respect to the Class B stock redemption, Jacoby stated: "We have had a separate outside investigation by a respected investment banking house, Lazard Freres, and they have stated that the price to be paid for Class B shares which will be redeemed at or prior to closing for $40,000,000 is a fair one."[3] A4.

Jacoby read the resolutions, prepared by Bates' counsel Cahill Gordon & Reindel, to approve the merger. Petitioner and Bates' other shareholders then voted without dissent to approve the Acquisition Agreement and to terminate the Stockholders Agreement, effective upon consummation of the merger. A4-A5. The verbatim text of Jacoby's statement to the shareholders was preserved and was reviewed by both the District and Circuit Courts.

The closing occurred approximately $2^1/_2$ months later, on August 7, 1986. During that time, the Acquisition Agreement, which had been available at the May 22 shareholders meeting, remained available for petitioner to review. Petitioner made no effort to do so.[4] She did not object to any of the Agreement's terms or take any action to block the closing.

---

3 The exact words of the Lazard Freres opinion were that "$40,000,000 is reasonable consideration to pay" for the Class B shares.

4 Despite the Agreement's availability, petitioner first looked at it four years later, during her deposition in this case in May 1990.

Before the closing, petitioner learned that two secretaries, whom she did not consider qualified to own Bates stock, were being allowed to acquire Class A shares. The Acquisition Agreement provided for those sales to the secretaries along with 21 other named employees. A4, A18. Petitioner did not object or take any action to try to stop those stock sales.

Shortly before the closing on August 7, 1986, petitioner and each of Bates' other shareholders signed a Letter of Transmittal, necessary to arrange for payment. Petitioner did so without objection.

Pursuant to the Acquisition Agreement, Jacoby received a total of $112.6 million: $40 million for his 30,000 Class B shares; $23.6 million for his 27,750 Class A shares; and $49 million for his Class A stock options. For her 700 shares, petitioner received exactly the amounts per share that Jacoby had told her at the May 1986 shareholders meeting she would receive. A5. Petitioner accepted her first payment on August 7, 1986, without objection. She received her second and final payment on August 7, 1988, two years after the closing (as provided by the Acquisition Agreement), again without objection. Petitioner never objected or took any action until she sued Jacoby in March 1989.

Petitioner's Lawsuit

Petitioner, alone, sued Jacoby for only money damages, claiming violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, allegedly committed in 1982 and 1986. Her complaint also alleged fraud, breach of fiduciary duty and breach of Bates' Stockholders Agreement in connection with Saatchi's acquisition of Bates. Petitioner's original and amended complaints are each styled as a "class action." However, petitioner never sought to certify a class during the $2^1/_2$ years that the case was pending in the District Court. No former Bates shareholder ever sought to intervene,

despite wide-spread publicity of the lawsuit. And no former shareholder has ever started any other action against Jacoby.

Following extensive discovery, petitioner moved for partial summary judgment on her claim that Jacoby had breached the Stockholders Agreement when he received $40 million for his Class B shares. Jacoby cross-moved for summary judgment dismissing the entire complaint, principally on the grounds that there was no evidence that any of the alleged misrepresentations or omissions had caused petitioner injury and because New York law barred her state law claims.

The District Court denied petitioner's motion for summary judgment and granted Jacoby's motion in its entirety, dismissing all counts of the complaint. A6-A8. Before ruling, the District Court invited petitioner to submit a post-argument affidavit (A6), thereby giving her yet another opportunity to explain how Jacoby's disclosure had injured her. Her three-paragraph affidavit is reproduced in its entirety at pages 51a-52a of the Petition to this Court.

The District Court dismissed the allegations of securities fraud in connection with the Saatchi merger because there was no evidence that any alleged misrepresentation or omission had caused petitioner any injury. Rather, petitioner's own statements to the District Court show that she continued to approve of the merger, conceding that the purchase price was "'in all respects fair and adequate' (Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 54)" (A14), that "the total sale price was an 'excellent' one (P. Mem. in Opp'n to Summ. J. at 1) and that she is not 'dissenting from' the merger (*id.* at 54)." A7.

The District Court rejected petitioner's state law challenge to the redemption of the Class B shares as well. The Court ruled that since Burke had approved of the merger and had disavowed any desire to rescind the transaction—not wishing to give up the huge premium over book value she had received from Saatchi in payment for her shares—she was not entitled

to challenge only that part of the transaction which resulted in the payment to Jacoby for his Class B shares. A8.

On appeal to the United States Court of Appeals for the Second Circuit, Burke reiterated that "[p]laintiff approves of the merger and the price which Saatchi paid for the Company (Burke brief on appeal at 39 n.16)," and pursued her attempt to have much of Jacoby's payment redistributed to other Class A stockholders. A8.

The Second Circuit affirmed the District Court's grant of summary judgment to Jacoby in all respects. After carefully analyzing the District Court's decision and the entire record, the Second Circuit, in an opinion by Circuit Judge Amalya Kearse, ruled that:

> "*The record thus contains no evidence whatever from which a reasonable juror could conclude that any of the alleged misrepresentations or omissions caused Burke any loss*. Accordingly, the District Court properly dismissed the timely asserted securities claims for lack of evidence of causation."

A15 (emphasis supplied).

With respect to Burke's claim that Jacoby breached his fiduciary duty by accepting $40 million for his Class B shares, the Second Circuit followed established New York statutory and case law and affirmed the District Court's ruling that appraisal and an action for equitable relief are the only remedies available to a shareholder who is dissatisfied with a merger. A15-A17.

The Second Circuit also affirmed the dismissal of each of petitioner's remaining claims, none of which are presented in the Petition. As with petitioner's allegations of federal securities fraud, the Second Circuit found that petitioner had presented *no evidence* to support essential elements needed for those other claims. A11, A17-A18.

REASONS FOR DENYING THE WRIT

The Petition does not identify a single special or important reason for granting a Writ of Certiorari. It misrepresents the record and the Second Circuit's findings in significant respects.

The Second Circuit's affirmance of summary judgment in respondent's favor adhered to this Court's standards and did not conflict with decisions of the other circuit courts. The Second Circuit did not abuse its discretion when it applied settled statutory law, as construed by New York State's highest appellate court, to affirm the District Court instead of certifying a question to New York State's Court of Appeals. There is no basis or reason for this Court to exercise its supervisory power. The Petition should be denied.

I. Petitioner's inaccurate presentation of her case provides an independent basis for denying her Petition.

The Petition is replete with factual misrepresentations and inaccuracies. Five glaring examples are illustrative:

1. Petitioner states that she brought her case as a class action. Pet. at 1-2.[5] However, she fails to inform this Court that she never sought to certify a class. Nonetheless, petitioner criticizes the Second Circuit for focusing exclusively on petitioner rather than on the shareholders as a group. Pet. at 6-7. Without any evidence, she attempts to trade on what other shareholders *might* have done (Pet. at 11), even though no other shareholder is a party.

2. Petitioner claims that respondent "surreptitiously" awarded stock options to himself in 1982. Pet. at 2. The record shows that Jacoby's options were "authorized by a shareholder resolution" in 1982 (A3), that Jacoby had told the shareholders he would receive stock options, and that petitioner "knew in 1982 that the stock option plan had

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5 Citations to the Petition are in the form "Pet. at ____."

been approved by the stockholders and that . . . Jacoby had been awarded options." A10.

3. Petitioner claims that Jacoby "concealed" the number of options he held. Pet. at 3. The record is directly contrary. As the Second Circuit found: "[Burke] has come forward with no evidence of any form of concealment on the part of Jacoby." A11.

4. Petitioner claims that "both [the District and Circuit] Courts below acknowledged the materiality as well as the falsity of the challenged statement and omissions." Pet. at 9. The record clearly shows that neither the District Court nor the Second Circuit made any finding of materiality and that neither Court concluded that any statement was false. Pet. at 39a; A13, A18.

5. Petitioner claims that the redemption of Jacoby's Class B shares "contravened" the Stockholders Agreement (Pet. at 2), but she does not inform the Court that the Stockholders Agreement restricted the transfer of *both* the Class A *and* Class B shares. She also fails to tell the Court that, because of those restrictions, she and the other shareholders voted to rescind the Stockholders Agreement, and acknowledged that termination in writing, so they could receive the huge premium over book value that Saatchi offered. A4-A5, A17.

These inaccuracies and others that abound in the Petition are an independent reason for dismissing the Petition pursuant to Supreme Court Rule 14.5.

II. The Second Circuit's decision conforms with this Court's applicable standards.

Properly stated, the first issue presented to the Court is whether the Second Circuit followed this Court's decisions regarding summary judgment. The Second Circuit correctly identified and applied the proper standards.

This Court has recognized that summary judgment is appropriate when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party . . . ." *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is required if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986).

The Second Circuit correctly applied the standard for summary judgment when it affirmed the District Court's dismissal of petitioner's claims for securities fraud because the record, developed after exhaustive discovery, contains no evidence to support a finding that an alleged misrepresentation or omission caused any loss to petitioner. As the Second Circuit stated:

> "The record thus contains no evidence whatever from which a reasonable juror could conclude that any of the alleged misrepresentations or omissions caused Burke any loss. Accordingly, the district court properly dismissed the timely asserted securities claims for lack of evidence of causation."

A15.

The Second Circuit's decision is firmly rooted in the record which, taken as a whole, shows that petitioner did not suffer any loss as a result of the alleged misrepresentations or omissions. There is no evidence to link Jacoby's disclosure to an identified loss. Rather, there are petitioner's repeated affirmative statements, both in the District and Circuit Courts, that she "approves of the merger" and is not "dissenting from" it. A7, A8, A14, A17; Pet. at 39a. The record further shows that petitioner received the exact per share amounts that Jacoby had told her she would receive, the same amounts required by the Acquisition Agreement. A4-A5.

Petitioner could not have received any larger amount unless she first dissented from the merger, an action she has repeatedly rejected. As the Second Circuit stated:

> "The record supports the district court's view that *Burke had come forward with no evidence that the claimed misrepresentations or omissions caused her any injury*, for she concedes that, whatever importance she might have placed on the undisclosed information, *she would not have performed the act that was necessary to obtain a better price for her shares than she received, i.e., dissent from the merger, either to impede its consummation or to obtain an appraisal of her shares.*"

A14 (emphasis supplied).

The Second Circuit cataloged petitioner's many opportunities to provide some evidence linking the alleged misrepresentations and omissions to some loss. Petitioner failed to identify any such evidence.

> "Burke had every opportunity in this litigation to state, if she could do so in good faith, that she would have dissented from the acquisition if she had known the facts she contends were misrepresented or concealed. In addition to the ordinary opportunity to present her case in opposition to Jacoby's motion for summary judgment, she was invited by the court at oral argument to represent, under oath, if she could do so in good faith, that she would not have sold her shares. In response, Burke's affidavit stated that she would have objected to 'the allocation of the proceeds of the merger'; but *she did not state that she would have dissented, which would have required her to forgo the large profit to be had on her own shares.*"

A14 (emphasis supplied).

The Petition perpetuates this failure. It merely speculates that petitioner and the other Bates shareholders might have "objected" to the redemption of the Class B shares, and some-

how forced Jacoby to distribute those monies to the shareholders, if they had known that Lazard Freres' opinion referred to the $40 million paid to redeem the B shares as "reasonable consideration" rather than as a "fair price." Pet. at 11. However, petitioner has never identified any action that she might have taken to restructure the merger or renegotiate some of its terms. And petitioner has never provided any proof that such action likely would have resulted in a re-allocation of the proceeds of the merger. *Cf. Madison Consultants* v. *Federal Deposit Insurance Corp.*, 710 F.2d 57, 64-65 & n.6 (2d Cir. 1983) (to prove causation, plaintiff must identify an available means of protection and show that, had he pursued such means, he would have succeeded).

Petitioner had a single investment decision: to approve the merger and receive a huge premium for her shares or to dissent from it—an option she has expressly rejected. A7, A8, A14. Moreover, what other shareholders might have done is irrelevant. Petitioner was the only plaintiff. No class was ever certified.

Ignoring this Court's summary judgment standards and unable to point to any evidence that the Second Circuit overlooked, petitioner claims that the Second Circuit failed to follow *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972). *See* Pet. at 8-9. To the contrary, the Second Circuit cited, quoted and correctly applied *Affiliated Ute*. A12-A13.

The Second Circuit's analysis of petitioner's allegations of securities fraud first identified the elements of a claim:

> "[A] plaintiff must show, *inter alia*, that the defendant, with scienter, made a misrepresentation of material fact or failed to disclose a material fact, and that the plaintiff relied on the misrepresentation or omission and suffered a loss as a result of the misrepresentation or omission."

A11.

The Second Circuit noted that courts sometimes refer to the reliance element as "transaction causation" and the causation element as "loss causation." A11-A12. Proof of reliance requires a showing that the alleged misrepresentations or omissions caused the plaintiff to engage in the transaction; proof of loss causation requires a showing that the alleged misrepresentations or omissions caused economic harm to the plaintiff.[6] *See, e.g., Bennett* v. *United States Trust Co.*, 770 F.2d 308, 313 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986).

The Second Circuit then recognized that, under *Affiliated Ute*, when omissions are claimed, a plaintiff's proof of materiality creates a presumption that can satisfy plaintiff's burden of proving reliance. A12-13.

However, since the record contained "no evidence whatever" that petitioner suffered a loss due to a misrepresentation or omission, the Second Circuit recognized that there was no proof of the essential element of loss causation. Thus, the Court concluded that any questions of fact which might exist with respect to materiality or reliance become irrelevant to deciding the summary judgment motion:

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6 The Second Circuit has frequently used this analysis in deciding securities fraud claims. *See, e.g., Wilson* v. *Ruffa & Hanover*, 844 F.2d 81, 85 (2d Cir. 1988), *aff'd on rehearing sub nom. Wilson* v. *Saintine Exploration & Drilling Corp.*, 872 F.2d 1124 (2d Cir. 1989); *Bennett* v. *United States Trust Co.*, 770 F.2d 308, 313 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986). Other circuits have adopted this analysis. No circuit court has rejected it. *See, e.g., Carlton* v. *Franklin*, 911 F.2d 721 (4th Cir. 1990) (unpublished decision reported at 1990 U.S. App. LEXIS 12946); *Huddleston* v. *Herman & MacLean*, 640 F.2d 534, 549 & n.24 (5th Cir. Unit A 1981), *aff'd in part, rev'd in part on other grounds*, 459 U.S. 375 (1983); *LHLC Corp.* v. *Cluett, Peabody & Co., Inc.*, 842 F.2d 928, 931 (7th Cir.), *cert. denied*, 488 U.S. 926 (1988); *Arthur Young & Co.* v. *Reves*, 937 F.2d 1310, 1327-28 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1165 (1992); *McGonigle* v. *Combs*, 968 F.2d 810, 820-21 (9th Cir.), *cert. dismissed sub nom. Casares* v. *Spendthrift Farm, Inc.*, 113 S. Ct. 399 (1992); *Currie* v. *Cayman Resources Corp.*, 835 F.2d 780, 785 (11th Cir. 1988).

> "[Q]uestions of materiality and reliance are not issues of material fact in the context of the summary judgment granted in the present case because, as we read the district court's opinion, the court dismissed Burke's federal securities claims—whether based on affirmative misrepresentation or omission—for lack of proof of loss causation."

A13-A14 (citations omitted).

The Second Circuit followed this Court's summary judgment standards, stating that:

> "If the undisputed facts reveal that there is an absence of sufficient proof as to one essential element of the claim, any factual disputes with respect to other elements of the claim become immaterial and cannot defeat a motion for summary judgment."

A13.

In this Court's own words:

> "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."

Celotex Corp. v. *Catrett*, 477 U.S. at 322-23.

Faced with petitioner's repeated statements to the District and Circuit Courts that she "approves of the merger" and, even today, is not "dissenting from" it (A7, A8), no reasonable juror could conclude that any alleged misrepresentation or omission caused petitioner any loss. The Second Circuit properly affirmed the District Court's grant of summary judgment in Jacoby's favor.

III. There is no basis for this Court to exercise its power of supervision to require the Second Circuit to certify a question of settled law to the New York State Court of Appeals.

The Second Circuit applied the plain language of the New York Business Corporation Law (BCL) § 623(k) and case law established by New York's highest court to affirm the District Court's dismissal of petitioner's state-law claim of breach of fiduciary duty. A15-A17. There was no reason for the Circuit Court to certify any question to the New York State Court of Appeals because there was no unsettled issue of state law.

The New York State Court of Appeals permits certification only when there is no controlling state law precedent:

> "Whenever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state that determinative questions of New York law are involved in a cause pending before it *for which there is no controlling precedent of the Court of Appeals*, such court may certify the dispositive questions of law to the Court of Appeals."

New York Rules of Court § 500.17(a) (emphasis supplied). *See also* Rules of the United States Court of Appeals for the Second Circuit § 0.27 (certification limited to "unsettled" questions of state law).

In this case, the Second Circuit applied settled state law. The Circuit Court recognized that, under established New York law, an appraisal proceeding and an "appropriate action" are the exclusive remedies available to a shareholder who is dissatisfied with the payment offered for her shares in a merger. A15. Under New York law, an "appropriate action" within the meaning of BCL § 623(k) is one seeking equitable relief. A15 (citing *Walter J. Schloss Associates* v. *Arkwin Industries, Inc.*, 61 N.Y.2d 700, 472 N.Y.S.2d 605 (1984) (adopting dissenting opinion of Mangano, J., in the Appellate Division as the New

York State Court of Appeals' opinion (90 A.D.2d at 153-62, 455 N.Y.S.2d at 847-52)) (*Schloss*); *Breed* v. *Barton*, 54 N.Y.2d 82, 444 N.Y.S.2d 609 (1981)). *See also Cawley* v. *SCM Corp.*, 72 N.Y.2d 465, 471, 534 N.Y.S.2d 344, 347 (1988); *Alpert* v. *28 Williams St. Corp.*, 63 N.Y.2d 557, 568, 483 N.Y.S.2d 667, 673 (1984). A claim for money damages is barred unless it is made "ancillary to a grant of traditionally equitable relief." A16 (citing *Schloss*, 90 A.D.2d at 160, 455 N.Y.S.2d at 851).

Petitioner never sought equitable relief or appraisal. To pursue those remedies in the hope of getting more money, petitioner would have had to forego the huge premium Saatchi agreed to pay for her shares. Instead, petitioner sought only money damages. As the Second Circuit concluded, BCL § 623(k) and *Schloss* preclude such an action:

> "*An action for damages alone will not lie, since this would allow a dissenting shareholder, by merely alleging fraudulent or unlawful corporate conduct, to seek therein the identical relief available to him in appraisal proceedings.* . . . Consequently, an action for damages by a minority shareholder based on the fraudulent or illegal corporate conduct of the majority in discharging its fiduciary duty would be unnecessarily duplicative."

A16 (quoting *Schloss*, 90 A.D.2d at 161, 455 N.Y.S.2d at 851) (emphasis supplied).

Petitioner's complaint that she did not receive notice of her appraisal right is a red herring. Petitioner has always insisted that she "approves of the merger" and is not "dissenting from" it. A7, A8, A14. Petitioner's own claims moot both the notice and appraisal issues. In any event, New York law is clear. Inadequate notice does not create a claim for money damages. It merely preserves a right to appraisal. *See, e.g.*, BCL § 623(a); *Carroll* v. *Seacroft, Ltd.*, 141 A.D.2d 726, 727-28, 529 N.Y.S.2d 829, 830 (2d Dep't 1988); *Rank Organization Ltd.* v. *Pathe Laboratories, Inc.*, 33 Misc. 2d 748, 753-54, 227 N.Y.S.2d 562, 567-68 (Sup. Ct. N.Y. County 1962).

This Court has acknowledged that certification of a question to a state court is a matter of discretion:

> "We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory . . . . Its use in a given case rests in the sound discretion of the federal court."

Lehman Brothers v. *Schein*, 416 U.S. 386, 390-91 (1974). A federal court's refusal to certify a question to a state court should not be disturbed unless there is a clear abuse of discretion. *See, e.g., Johnson* v. *John Deere Co.*, 935 F.2d 151, 154 (8th Cir. 1991); *Federal Deposit Insurance Corp.* v. *Ponce*, 904 F.2d 740, 746 (1st Cir. 1990). Even petitioner does not claim that the Second Circuit abused its discretion, but only that the Second Circuit's decision not to seek certification was "dubious." Pet. at 15.

The Second Circuit's decision not to certify a question in connection with settled issues of New York State law was well within its discretion. Petitioner has no basis to invoke the exercise of this Court's power of supervision.

CONCLUSION

The Second Circuit's decision adheres to decisions of this Court. It does not conflict with decisions of other circuit courts. There is no basis or reason for this Court to exercise its power of supervision. The Petition should be denied in all respects.

Dated: New York, New York
April 12, 1993

Respectfully submitted,

JOHN HARTJE*
A. KAIPER WILSON
ROBERT S. SHWARTS

KRONISH, LIEB, WEINER & HELLMAN
1345 Avenue of the Americas
New York, New York 10105-0202
(212) 841-6000

Attorneys for Respondent Robert E. Jacoby

**Counsel of Record*

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1063—August Term, 1991

(Argued: March 4, 1992 Decided: December 29, 1992)

Docket No. 91-9148

JEAN LORELLE BURKE,

Plaintiff-Appellant,

—v.—

ROBERT E. JACOBY,

Defendant-Appellee.

Before:

KEARSE and ALTIMARI, *Circuit Judges*,
and TELESCA, *Chief Judge**.

Appeal from a judgment of the United States District Court for the Southern District of New York, Miriam Goldman

* Honorable Michael A. Telesca, Chief Judge of the United States District Court for the Western District of New York, sitting by designation.

Cedarbaum, *Judge*, dismissing complaint charging federal securities fraud and state law violations.

Affirmed.

RICHARD M. MEYER, New York, New York (Lee S. Shalov, Milberg Weiss Bershad Specthrie & Lerach, New York, New York, on the brief), *for Plaintiff-Appellant.*

JOHN HARTJE, New York, New York (A. Kaiper Wilson, Robert S. Shwarts, Kronish, Lieb, Weiner & Hellman, New York, New York, on the brief), *for Defendant-Appellee.*

KEARSE, Circuit Judge:

Plaintiff Jean Lorelle Burke, a former employee and stockholder of Ted Bates Worldwide, Inc. ("Bates" or the "Company"), appeals from a final judgment of the United States District Court for the Southern District of New York, Miriam Goldman Cedarbaum, *Judge*, dismissing her complaint for damages against defendant Robert E. Jacoby under § 10(b) of the Securities and Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78j(b) (1988), Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (1992), and state law, alleging misrepresentations, omissions, breach of contract, and breaches of fiduciary duty in connection with the acquisition of Bates by another company. The district court granted summary judgment dismissing the complaint principally on the grounds (1) that certain of the alleged omissions concerned facts already known by Burke, (2) that Burke failed to

come forward with evidence that she had relied on the alleged misrepresentations or omissions or that they had caused her claimed loss, and (3) that certain of her claims were barred by the statute of limitations. On appeal, Burke contends, *inter alia*, that the district court applied erroneous legal standards of reliance and causation in assessing her federal securities claims and that partial summary judgment should have been entered in her favor on the breach-of-contract claim. She also argues that the district court's statute-of-limitations ruling with respect to one of the federal securities claims must be set aside in light of a recent amendment to the 1934 Act. For the reasons below, we reject her contentions and affirm the judgment of the district court.

I. BACKGROUND

A. *The Bates-Saatchi Merger*

Prior to August 1986, Bates was an employee-owned advertising company. Jacoby was its president, chairman, and chief executive officer, as well as its controlling stockholder. Bates had two classes of stock. Class A was issued to key executives of the Company. A "Stockholders Agreement" limited the transferability of such stock, permitting its resale only to the Company, or to designated employees, at a price calculated principally by dividing the Company's net asset value by the number of Class A shares outstanding. Burke owned 700 shares of the Class A stock. Jacoby owned 27,750 Class A shares; in addition, as authorized by a shareholder resolution adopted in 1982, he had options covering 80,000 Class A shares.

All of the Bates Class B stock, of which there were 30,000 shares, was owned by Jacoby. The Stockholders Agreement also restricted transfer of the Class B stock, the repurchase price of which was fixed at $.50 per share. Under the certifi-

cate of incorporation, each Class A share, of which fewer than 500,000 were outstanding, had one vote; each of the 30,000 Class B shares had 50 votes. Thus, Jacoby, with more than 1,500,000 votes, had voting control of the Company.

In August 1986, Bates was acquired by Saatchi & Saatchi Company, PLC ("Saatchi"). The Acquisition Agreement, approved by the Bates stockholders in May 1986, principally (1) required Bates prior to the closing (a) to redeem 22,788 Class A shares for $17.4 million, and (b) to redeem Jacoby's 30,000 Class B shares for $40 million; (2) allowed Bates prior to the closing to sell some 30,000 Class A shares to approximately 20 employees; and (3) required Saatchi to pay a total of $450 million in cash to persons who, at the time of the closing, held Class A shares or options. Each holder of Class A stock was to receive $765.3953 per share upon completion of the acquisition, plus $87.6286 per share two years later, for a total of approximately $853 per share. Holders of stock options were to receive the same price per share, minus the exercise price of the option. The Acquisition Agreement also provided appraisal rights for stockholders who dissented.

At the May 1986 stockholders' meeting, Jacoby spelled out the above terms, noting that, absent the acquisition, the book value of the Class A stock at the end of the fiscal year would be $390 per share. When he announced the acquisition price of approximately $853 per Class A share, the stockholders, including Burke, applauded. As to the Class B stock repurchase, Jacoby stated, "We have had a separate outside investigation by a respected investment banking house, Lazard Freres, and they have stated that the price to be paid for Class B shares which will be redeemed at or prior to closing for $40,000,000 is a fair one." The shareholders, including Burke, approved the proposed Saatchi transaction. They also unanimously approved a resolution terminating the

Stockholders Agreement, effective upon consummation of the acquisition.

Pursuant to the Acquisition Agreement, Jacoby received a total of $112.6 million, consisting of the $40 million for his 30,000 Class B shares, $23.6 million for his 27,750 Class A shares, and $49 million for his Class A stock options. For her 700 shares, Burke received the per-share amounts specified by Jacoby in the May 1986 stockholders' meeting presentation. In her letter transmitting her stock to Saatchi, Burke acknowledged that the Stockholders Agreement restricting transferability of the stock was rescinded concurrently with the consummation of the acquisition.

B. *The Present Lawsuit*

In March 1989, Burke commenced the present action for damages, alleging that Jacoby had misrepresented or failed to disclose certain material facts in connection with the Saatchi acquisition. The complaint alleged principally (a) that Jacoby had failed to disclose in 1982 that he would receive options on the Class A shares; (b) that Jacoby had failed to disclose in May 1986 that, while negotiating with Saatchi, Bates had received a competing offer that Jacoby summarily rejected; (c) that Jacoby had failed to disclose in May 1986 how many Class A stock options he held; and (d) that Jacoby had misrepresented the investment banker's opinion of the price for the Class B shares, stating that the banker had termed the price "fair," when in fact the banker had said that the price was "reasonable." The complaint also alleged, *inter alia*, that Jacoby breached his fiduciary duty (a) by accepting $40 million for his 30,000 Class B shares as, in essence, a "control premium," and (b) by having Bates sell a total of 3,500 Class A shares to two employees who were not executives but secretaries. Burke sought damages and an "accounting" of Jacoby's profits from the Saatchi transaction.

Following a period of discovery, Burke moved for partial summary judgment principally on the ground that Jacoby's receipt of $40 million for his Class B shares breached the Stockholders Agreement. Jacoby cross-moved for summary judgment dismissing the entire complaint on the grounds, *inter alia*, that Burke could not show that any of the alleged misrepresentations or omissions had been relied on or had caused her injury, and that she was not entitled to damages on any of her state-law claims.

After receiving voluminous papers and hearing oral argument, and after inviting and receiving a postargument affidavit from Burke, the district court granted Jacoby's motion for summary judgment and denied Burke's motion. In a Memorandum Opinion and Order dated October 10, 1991 ("Opinion"), the court ruled that insofar as Burke's securities claims rested on events that occurred in 1982, they were barred by the one year/three year statute of limitations adopted in *Ceres Partners v. GEL Associates*, 918 F.2d 349 (2d Cir. 1990) (one year from discovery, but not more than three years from occurrence), and *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991) (same), and made retroactive by *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991). As set forth below, the court dismissed the remaining securities claims on the ground that Burke had not come forward with evidence of reliance or causation, noting that Burke "does not assert that she would have voted against the merger even if she had been aware of the extent of [Jacoby]'s self-dealing, and even now, she does not wish to undo the merger." Opinion at 2.

As to the claim based on Jacoby's statement that the investment banker had said that $40 million was a "fair," instead of a "reasonable," price for the Class B stock, the court stated that Burke failed to show that the "misrepresentation complained of was at least a 'but for' cause of the transaction

in question," Opinion at 12, and that there was "no evidence of loss causation," noting as follows:

> At the oral argument of this motion, I invited Burke's counsel to submit evidence, in the form of an affidavit from Burke, that she relied upon Jacoby's description of Lazard's opinion in deciding to sell her shares. (*See* Hearing Tr. at 19-20.) In response, Burke submitted an affidavit stating only: "Had I known of the falsity of that representation, I would have objected to the allocation of the proceeds of the merger on the terms then set forth." She does not state that she would have dissented from the merger. Thus, since there is no evidence of loss causation, an essential element of a claim of fraud in connection with the purchase or sale of securities, Jacoby's motion for summary judgment on this part of the Section 10(b) claim is granted.

Opinion at 12. As to the claimed omissions, the court observed that Burke

> has never stated that she would have voted against the merger even if she had been apprised of Jacoby's option holdings or potential profit on them, despite my invitation for her to do so. (*See* Hearing Tr. at 19-20; Burke Aff.) On the contrary, she has maintained the position that the total sale price was an "excellent" one (P. Mem. in Opp'n to Summ. J. at 1) and that she is not " 'dissenting from' " the merger (*id.* at 54).

Opinion at 14-15; *see id.* at 17 (as to the third-party offer to buy the Bates stock, "[a]gain . . . plaintiff has made no showing that she would have voted against the merger had she been in possession of the information" and hence "has failed to make the requisite showing of loss causation"). The court noted that a § 10(b) plaintiff "must establish that the

misrepresentations complained of caused the injury suffered," Opinion at 15, and concluded that

> although there may be a genuine issue of material fact as to whether the omission plaintiff complains of was material and misleading, there is no evidence that it affected her vote or her desire to sell her shares. Thus, the misrepresentation cannot be said to have caused the alleged injury.

Id.

The court also ruled, *inter alia*, that since Burke disavowed any desire to rescind the transaction, not wishing to forgo what she had received in the transaction, she was not entitled to challenge that part of the transaction that resulted in the payment to Jacoby for his Class B shares.

Judgment was entered dismissing the complaint, and this appeal followed.

II. DISCUSSION

On appeal, Burke, stating that "[p]laintiff approves of the merger and the price which Saatchi paid for the Company" (Burke brief on appeal at 39 n.16), pursues her attempt to have much of the payment received by Jacoby redistributed to other Class A stockholders. She contends principally that, in light of an amendment to the 1934 Act, her securities claim based on the 1982 stock options is not barred by the statute of limitations; that the district court applied erroneous legal standards of reliance and causation to her other federal securities claims; that the court erred in ruling that statutory appraisal was her only remedy for the claim that Jacoby breached his fiduciary duty to Bates shareholders by receiving $40 million for his 30,000 Class B shares; and that the court erred in not ruling that as a matter of law the $40 million

payment to Jacoby for his Class B shares breached the Stockholders Agreement. For the reasons below, we find no basis for reversal.

A. *The Statute of Limitations on the 1982 Nondisclosure Claim*

Burke contends that notwithstanding the one year/three year limitations period for claims under Rule 10b-5 established by *Ceres Partners v. GEL Associates*, 918 F.2d 349 ("*Ceres*"), and *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, and the ruling in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, requiring that the one year/three year rule be applied retroactively, her claims based on 1982 events have been revived by the recently enacted § 27A of the 1934 Act, 15 U.S.C.A. § 78aa-1 (West Supp. 1992), which modifies the retroactivity of the one year/three year rule. Her reliance on § 27A is misplaced.

Section 27A(b) provides that the limitation period for a claim under § 10(b) or Rule 10b-5

> commenced on or before June 19, 1991 – (1) which was dismissed as time barred subsequent to June 19, 1991, *and (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction*, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff.

15 U.S.C.A. § 78aa-1(b) (West Supp. 1992) (emphasis added). As indicated by the language emphasized, this section does not authorize reinstatement of a claim that would have been time-barred under the principles applicable on June 19, 1991. Leaving aside the question of whether, in light of § 27A(b), the *Ceres* rule, adopted by this Court prior to June 19, 1991, is to have retroactive application to claims filed

prior to the *Ceres* decision, *see Henley v. Slone*, 961 F.2d 23, 25-26 (2d Cir. 1992), that section affords Burke no relief, for her claim was time-barred even under pre-*Ceres* precedent. *See generally Grondahl v. Merritt & Harris, Inc.*, 964 F.2d 1290, 1292-93 (2d Cir. 1992) (no need to analyze applicability of *Ceres* if claim would also have been barred under pre-*Ceres* rule).

Prior to *Ceres*, a Rule 10b-5 action that accrued in New York and was brought in a district court within New York was time-barred in this Circuit if not brought "within six years from the time the cause of action accrued or within two years from the time the wrongdoing was, or with reasonable diligence should have been, discovered." *Armstrong v. McAlpin*, 699 F.2d 79, 87 (2d Cir. 1983); *see also Stull v. Bayard*, 561 F.2d 429, 431-32 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978). Here Jacoby's allegedly wrongful acquisition of stock options occurred in May 1982. The issuance of such options was approved at the 1982 annual meeting of stockholders, and Jacoby disclosed at that meeting that he was one of the employees who would receive options pursuant to the plan. Though Burke claims that she did not know in 1986 how many options Jacoby held, she does not dispute that she knew in 1982 that the stock option plan had been approved by the stockholders and that she knew in 1982 that Jacoby had been awarded options. The claim in the present action that Jacoby violated the securities laws in 1982 by not informing stockholders prior to their approval of the stock option plan that he intended to award himself 80,000 shares was not asserted until 1989, more than six years after the options were issued and more than six years after Burke knew that some options had been awarded. Thus Burke's claim would have been untimely even prior to the adoption of the one year/three year limitations period in *Ceres*. Accordingly, even if *Ceres* were not to be applied retroactively to claims pending at the

time of its decision, § 27A(b) does not authorize reinstatement of Burke's claim.

Burke's contention that even the six-year limitations period should not bar her claim because of principles of equitable estoppel has no merit. The record plainly reveals that Burke had sufficient facts to inquire, if she had been interested, into precisely how many shares were optioned to Jacoby, and she has come forward with no evidence of any form of concealment on the part of Jacoby.

B. *Reliance and Causation*

In her challenge to the dismissal of the remaining securities claims, Burke contends that the district court, in finding dispositive her failure to show that she would have dissented from the acquisition had she had full knowledge of the facts, applied erroneous standards of reliance and causation. Even if we interpreted the district court's opinion as imposing an improper standard of reliance with respect to Burke's claims of misleading omissions, the court's standard of causation was clearly proper, and hence we see no basis for reversal.

Rule 10b-5 makes it unlawful, in pertinent part, "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, . . . in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5. In order to prove a claim under § 10(b) or Rule 10b-5, a plaintiff must show, *inter alia*, that the defendant, with scienter, made a misrepresentation of material fact or failed to disclose a material fact, and that the plaintiff relied on the misrepresentation or omission and suffered a loss as a result of the misrepresentation or omission. *See, e.g., Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 61 (2d Cir. 1985). The reliance element of the claim is sometimes referred to as

"transaction causation," and the causation element is sometimes referred to as "loss causation." *See, e.g., Litton Industries, Inc. v. Lehman Brothers Kuhn Loeb Inc.*, 967 F.2d 742, 747 (2d Cir. 1992); *Bennett v. United States Trust Co.*, 770 F.2d 308, 313 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986). The two concepts are closely allied, for there generally is no causation without reliance. There can, however, be reliance without causation.

A plaintiff's burden with respect to the reliance element of a Rule 10b-5 claim may vary depending on whether the claim alleges fraudulent representations or fraudulent omissions. In connection with a claim that the defendant has affirmatively made false statements, plaintiff must demonstrate that he or she relied on the misrepresentation when entering the transaction that caused him or her economic harm. *See, e.g., Wilson v. Ruffa & Hanover, P.C.*, 844 F.2d 81, 86 (2d Cir. 1988), *aff'd on reh'g sub nom. Wilson v. Saintine Exploration & Drilling Corp.*, 872 F.2d 1124 (2d Cir. 1989); *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 380 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975). In connection with a claim of material omission, however, "positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision." *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972); *see also duPont v. Brady*, 828 F.2d 75, 78 (2d Cir. 1987) (" 'in instances of total non-disclosure, . . . it is of course impossible to demonstrate reliance' ") (quoting *Titan Group, Inc. v. Faggen*, 513 F.2d 234, 239 (2d Cir.), *cert. denied*, 423 U.S. 840 (1975)). Thus, "once the plaintiff establishes the materiality of the omission by a preponderance of the evidence, the burden shifts to the defendant to establish also by a preponderance of the evidence that the plaintiff did not rely on the omission in making

the investment decision." *duPont v. Brady*, 828 F.2d at 76; *see also Litton Industries, Inc. v. Lehman Brothers Kuhn Loeb Inc.*, 967 F.2d at 748.

Summary judgment should be granted only if there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). In order to obtain that relief, the moving party need not prove that his opponent's case is wholly frivolous. When a defendant has moved for summary judgment on the ground that undisputed facts reveal that the plaintiff cannot establish an essential element of the claim, on which element the plaintiff has the burden of proof, and the plaintiff has failed to come forth with evidence sufficient to permit a reasonable juror to return a verdict in his or her favor on that element, summary judgment should be granted. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). If the undisputed facts reveal that there is an absence of sufficient proof as to one essential element of the claim, any factual disputes with respect to other elements of the claim become immaterial and cannot defeat a motion for summary judgment. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. at 322-23; *Knight v. U.S. Fire Insurance Co.*, 804 F.2d 9, 11-12 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); *Quarles v. General Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985) (per curiam).

In the present case, there may be, as the district court noted, questions of fact as to whether the alleged omissions were material, or whether the description of the Lazard Frères opinion was a material misrepresentation, in the sense that reasonable stockholders might have considered the accurate information important to their decisions as to whether or not to vote for the acquisition. And it may be, as to the claims of omissions, that the undisclosed information was material, thereby prima facie establishing reliance. But these questions of materiality and reliance are not issues of material fact in

the context of the summary judgment granted in the present case because, as we read the district court's opinion, the court dismissed Burke's federal securities claims—whether based on affirmative misrepresentation or omission—for lack of proof of loss causation. *See* Opinion at 12, 15, 17.

The record supports the district court's view that Burke had come forward with no evidence that the claimed misrepresentations or omissions caused her any injury, for she concedes that, whatever importance she might have placed on the undisclosed information, she would not have performed the act that was necessary to obtain a better price for her shares than she received, *i.e.*, dissent from the merger, either to impede its consummation or to obtain an appraisal of her shares. Burke had every opportunity in this litigation to state, if she could do so in good faith, that she would have dissented from the acquisition if she had known the facts she contends were misrepresented or concealed. In addition to the ordinary opportunity to present her case in opposition to Jacoby's motion for summary judgment, she was invited by the court at oral argument to represent, under oath, if she could do so in good faith, that she would not have sold her shares. In response, Burke's affidavit stated that she would have objected to "the allocation of the proceeds of the merger"; but she did not state that she would have dissented, which would have required her to forgo the large profit to be had on her own shares. At no point did Burke suggest that she would have voted against the acquisition had she known any or all of the facts she claims were not disclosed to her. In the district court, she termed the purchase price "in all respects fair and adequate" (Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 54); and in this Court, as noted above, she stated that she still approves of the merger.

The record thus contains no evidence whatever from which a reasonable juror could conclude that any of the alleged misrepresentations or omissions caused Burke any loss. Accordingly, the district court properly dismissed the timely asserted securities claims for lack of evidence of causation.

C. *The Challenge to the Payment for the Class B Shares*

Burke contends that the district court erred in ruling that her remedies for the claim that Jacoby breached his fiduciary duty to Bates shareholders by accepting $40 million for his 30,000 Class B shares were limited to her statutory appraisal right or equitable relief. We disagree.

In ruling that Burke was limited to her appraisal rights, the district court relied on § 623(k) of the New York Business Corporation Law, which provided that

> [t]he enforcement by a shareholder of his right to receive payment for his shares in the manner provided herein [*i.e.*, by an appraisal proceeding] shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership, . . . except that this section shall not exclude the right of such shareholder to bring or maintain an appropriate action to obtain relief on the ground that such corporate action will be or is unlawful or fraudulent as to him.

New York Bus. Corp. Law § 623(k) (McKinney 1986). An "appropriate action" within the meaning of § 623(k) is an action seeking equitable relief, and that type of action and the exercise of the right of appraisal are the dissatisfied stockholder's only avenues of relief. *See Walter J. Schloss Associates v. Arkwin Industries, Inc.*, 61 N.Y.2d 700, 472 N.Y.S.2d 605 (1984) (adopting dissenting opinion of Mangano, J., at the Appellate Division as Court of Appeals opin-

ion), *rev'g* 90 A.D.2d 149, 455 N.Y.S.2d 844 (2d Dep't 1982) ("*Schloss*"); *Breed v. Barton*, 54 N.Y.2d 82, 444 N.Y.S.2d 609 (1981). Money damages are not available except as "ancillary to a grant of traditionally equitable relief." *Schloss*, 90 A.D.2d at 160, 455 N.Y.S.2d at 851. As the *Schloss* court explained:

> An action for damages alone will not lie, since this would allow a dissenting shareholder, by merely alleging fraudulent or unlawful corporate conduct, to seek therein the identical relief available to him in appraisal proceedings. For example, where, as here, there is "a forced liquidation or sale of the minority shareholders' stock incident to a merger" . . . the full and proper monetary recovery of the fair value of the dissenters' shares may be obtained in appraisal proceedings in which the discharge of the majority's fiduciary duty to the minority can be weighed in determining fair value . . . . Consequently, an action for damages by a minority shareholder based on the fraudulent or illegal corporate conduct of the majority in discharging its fiduciary duty would be unnecessarily duplicative.

Id. at 161, 455 N.Y.S.2d at 851 (footnote omitted). The equitable relief to which an award of damages could be ancillary means relief other than a so-called request for an accounting that is merely a request for damages in another form. *See id.* at 162 n.6, 455 N.Y.S.2d at 852 n.6 ("The complaint does not seek to have defendant . . . account to plaintiff as representative of the premerger corporation but appears to request an accounting and payment of improperly withheld funds by [defendant] to plaintiff in its individual capacity, revealing plaintiff's real, and, in fact stated, intent, i.e., to obtain damages.").

Burke's complaint requested compensatory and punitive damages, together with an accounting that the district court properly viewed as essentially a request for damages. Burke made no attempt to obtain traditionally equitable relief such as a rescission of the merger. As indicated above, she took the position in the district court that the purchase price was "in all respects fair and adequate," and that she was not "dissenting" from the merger. (Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 54.) Her request for an "accounting," like the request in *Schloss*, was not for equitable relief from Jacoby as to funds belonging to the Company but rather sought funds he received in his individual capacity. *Schloss* forecloses that relief.

Accordingly, we affirm the district court's dismissal of Burke's state-law breach-of-fiduciary-duty claim concerning the redemption of Jacoby's Class B stock.

D. *Other Arguments*

Burke's other challenges to the dismissal of her complaint do not require extended discussion. Her breach-of-contract claim, on which she contends the court should have granted summary judgment in her favor, was properly rejected as a matter of law. That claim relied on the Stockholders Agreement. The stockholders, however, in voting to approve the Saatchi acquisition, explicitly voted to rescind the Stockholders Agreement to coincide with the acquisition. Further, each Class A stockholder, including Burke, acknowledged the termination of the Stockholders Agreement in transmitting his or her Class A shares to consummate the acquisition. Since Burke has disavowed any desire to rescind or dissent from the acquisition, the Stockholders Agreement affords her no basis for a claim.

Burke's complaint that Class A stock was improperly issued to two of Bates's secretaries, who were not "key execu-

tive employees" entitled to such stock was also properly dismissed. A schedule attached to that Agreement listed the two secretaries and the other employees who were to receive Class A shares prior to the closing; we see no indication in the record that if any of the authorized Class A shares had not been issued to the persons listed in the schedule, they were to be issued to others such as Burke. Further, the Acquisition Agreement specified, to the hundredth of a cent, the price to be paid to stockholders for each Class A share; we see no indication that if any of the authorized shares were not issued in accordance with the schedule, the price paid for the already issued shares was to be increased. Burke presented no evidence from which an inference could be drawn that had she been notified of the sales, or had they not been made, she would have received a greater price per share. Thus, we uphold the district court's rulings that the issuance of shares to the secretaries was not material to Burke's vote on the merger, was not material to the surrender of her stock, and did not cause her any injury.

CONCLUSION

We have considered all of Burke's arguments on this appeal and have found in them no basis for reversal. The judgment of the district court is affirmed.

NEW YORK BUSINESS CORPORATION LAW § 623

§ 623. Procedure to enforce shareholder's right to receive payment for shares.—(a) A shareholder intending to enforce his right under a section of this chapter to receive payment for his shares if the proposed corporate action referred to therein is taken shall file with the corporation, before the meeting of shareholders at which the action is submitted to a vote, or at such meeting but before the vote, written objection to the action. The objection shall include a notice of his election to dissent, his name and residence address, the number and classes of shares as to which he dissents and a demand for payment of the fair value of his shares if the action is taken. Such objection is not required from any shareholder to whom the corporation did not give notice of such meeting in accordance with this chapter or where the proposed action is authorized by written consent of shareholders without a meeting.

(b) Within ten days after the shareholders' authorization date, which term as used in this section means the date on which the shareholders' vote authorizing such action was taken, or the date on which such consent without a meeting was obtained from the requisite shareholders, the corporation shall give written notice of such authorization or consent by registered mail to each shareholder who filed written objection or from whom written objection was not required, excepting any shareholder who voted for or consented in writing to the proposed action and who thereby is deemed to have elected not to enforce his right to receive payment for his shares.

(c) Within twenty days after the giving of notice to him, any shareholder from whom written objection was not required and who elects to dissent shall file with the corporation a written notice of such election, stating his name and residence address, the number and classes of shares as to which he dissents and a demand for payment of the fair value of his shares. Any shareholder who elects to dissent from a merger under section 905 (Merger of subsidiary corporation) or paragraph (c) of section 907 (Merger or consoli-

dation of domestic and foreign corporations) or from a share exchange under paragraph (g) of Section 913 (Share exchanges) shall file a written notice of such election to dissent within twenty days after the giving to him of a copy of the plan of merger or exchange or an outline of the material features thereof under section 905 or 913.

(d) A shareholder may not dissent as to less than all of the shares, as to which he has a right to dissent, held by him of record, that he owns beneficially. A nominee or fiduciary may not dissent on behalf of any beneficial owner as to less than all of the shares of such owner, as to which such nominee or fiduciary has a right to dissent, held of record by such nominee or fiduciary.

(e) Upon consummation of the corporate action, the shareholder shall cease to have any of the rights of a shareholder except the right to be paid the fair value of his shares and any other rights under this section. A notice of election may be withdrawn by the shareholder at any time prior to his acceptance in writing of an offer made by the corporation, as provided in paragraph (g), but in no case later than sixty days from the date of consummation of the corporate action except that if the corporation fails to make a timely offer, as provided in paragraph (g), the time for withdrawing a notice of election shall be extended until sixty days from the date an offer is made. Upon expiration of such time, withdrawal of a notice of election shall require the written consent of the corporation. In order to be effective, withdrawal of a notice of election must be accompanied by the return to the corporation of any advance payment made to the shareholder as provided in paragraph (g). If a notice of election is withdrawn, or the corporate action is rescinded, or a court shall determine that the shareholder is not entitled to receive payment for his shares, or the shareholder shall otherwise lose his dissenters' rights, he shall not have the right to receive payment for his shares and he shall be reinstated to all his rights as a shareholder as of the consummation of the corporate action, including any intervening preemptive rights and the right to payment of any intervening dividend or other distribution or, if any such rights have expired or any such dividend or distri-

bution other than in cash has been completed, in lieu thereof, at the election of the corporation, the fair value thereof in cash as determined by the board as of the time of such expiration or completion, but without prejudice otherwise to any corporate proceedings that may have been taken in the interim.

(f) At the time of filing the notice of election to dissent or within one month thereafter the shareholder of shares represented by certificates shall submit the certificates representing his shares to the corporation, or to its transfer agent, which shall forthwith note conspicuously thereon that a notice of election has been filed and shall return the certificates to the shareholder or other person who submitted them on his behalf. Any shareholder of shares represented by certificates who fails to submit his certificates for such notation as herein specified shall, at the option of the corporation exercised by written notice to him within forty-five days from the date of filing of such notice of election to dissent, lose his dissenter's rights unless a court, for good cause shown, shall otherwise direct. Upon transfer of a certificate bearing such notation, each new certificate issued therefor shall bear a similar notation together with the name of the original dissenting holder of the shares and a transferee shall acquire no rights in the corporation except those which the original dissenting shareholder had at the time of transfer.

(g) Within fifteen days after the expiration of the period within which shareholders may file their notices of election to dissent, or within fifteen days after the proposed corporate action is consummated, whichever is later (but in no case later than ninety days from the shareholders' authorization date), the corporation or, in the case of a merger or consolidation, the surviving or new corporation, shall make a written offer by registered mail to each shareholder who has filed such notice of election to pay for his shares at a specified price which the corporation considers to be their fair value. Such offer shall be accompanied by a statement setting forth the aggregate number of shares with respect to which notices of election to dissent have been received and the aggregate number of holders of such shares. If the corporate action has

been consummated, such offer shall also be accompanied by (1) advance payment to each such shareholder who has submitted the certificates representing his shares to the corporation, as provided in paragraph (f), of an amount equal to eighty percent of the amount of such offer, or (2) as to each shareholder who has not yet submitted his certificates a statement that advance payment to him of an amount equal to eighty percent of the amount of such offer will be made by the corporation promptly upon submission of his certificates. If the corporate action has not been consummated at the time of the making of the offer, such advance payment or statement as to advance payment shall be sent to each shareholder entitled thereto forthwith upon consummation of the corporation action. Every advance payment or statement as to advance payment shall include advice to the shareholder to the effect that acceptance of such payment does not constitute a waiver of any dissenters' rights. If the corporate action has not been consummated upon the expiration of the ninety day period after the shareholders' authorization date, the offer may be conditioned upon the consummation of such action. Such offer shall be made at the same price per share to all dissenting shareholders of the same class, or if divided into series, of the same series and shall be accompanied by a balance sheet of the corporation whose shares the dissenting shareholder holds as of the latest available date, which shall not be earlier than twelve months before the making of such offer, and a profit and loss statement or statements for not less than a twelve-month period ended on the date of such balance sheet or, if the corporation was not in existence throughout such twelve month period, for the portion thereof during which it was in existence. Notwithstanding the foregoing, the corporation shall not be required to furnish a balance sheet or profit and loss statement or statements to any shareholder to whom such balance sheet or profit and loss statement or statements were previously furnished, nor if in connection with obtaining the shareholders' authorization for or consent to the proposed corporate action the shareholders were furnished with a proxy or information statement, which included financial statements, pursuant to Regulation 14A or

Regulation 14C of the United States Securities and Exchange Commission. If within thirty days after the making of such offer, the corporation making the offer and any shareholder agree upon the price to be paid for his shares, payment therefor shall be made within sixty days after the making of such offer or the consummation of the proposed corporate action, whichever is later, upon the surrender of the certificates for any such shares represented by certificates.

(h) The following procedure shall apply if the corporation fails to make such offer within such period of fifteen days, or if it makes the offer and any dissenting shareholder or shareholders fail to agree with it within the period of thirty days thereafter upon the price to be paid for their shares:

(1) The corporation shall, within twenty days after the expiration of whichever is applicable of the two periods last mentioned, institute a special proceeding in the supreme court in the judicial district in which the office of the corporation is located to determine the rights of dissenting shareholders and to fix the fair value of their shares. If, in the case of merger or consolidation, the surviving or new corporation is a foreign corporation without an office in this state, such proceeding shall be brought in the county where the office of the domestic corporation, whose shares are to be valued, was located.

(2) If the corporation fails to institute such proceeding within such period of twenty days, any dissenting shareholder may institute such proceeding for the same purpose not later than thirty days after the expiration of such twenty day period. If such proceeding is not instituted within such thirty day period, all dissenter's rights shall be lost unless the supreme court, for good cause shown, shall otherwise direct.

(3) All dissenting shareholders, excepting those who, as provided in paragraph (g), have agreed with the corporation upon the price to be paid for their shares, shall be made parties to such proceeding, which shall have the effect of an action quasi in rem against their shares. The corporation shall serve a copy of the petition in such proceeding upon each dissenting shareholder who is a resident of this state in the manner provided by law for the service of a summons,

and upon each nonresident dissenting shareholder either by registered mail and publication, or in such other manner as is permitted by law. The jurisdiction of the court shall be plenary and exclusive.

(4) The court shall determine whether each dissenting shareholder, as to whom the corporation requests the court to make such determination, is entitled to receive payment for his shares. If the corporation does not request any such determination or if the court finds that any dissenting shareholder is so entitled, it shall proceed to fix the value of the shares, which, for the purposes of this section, shall be the fair value as of the close of business on the day prior to the shareholders' authorization date. In fixing the fair value of the shares, the court shall consider the nature of the transaction giving rise to the shareholder's right to receive payment for shares and its effects on the corporation and its shareholders, the concepts and methods then customary in the relevant securities and financial markets for determining fair value of shares of a corporation engaging in a similar transaction under comparable circumstances and all other relevant factors. The court shall determine the fair value of the shares without a jury and without referral to an appraiser or referee. Upon application by the corporation or by any shareholder who is a party to the proceeding, the court may, in its discretion, permit pretrial disclosure, including, but not limited to, disclosure of any expert's reports relating to the fair value of the shares whether or not intended for use at the trial in the proceeding and notwithstanding subdivision (d) of section 3101 of the civil practice laws and rules.

(5) The final order in the proceeding shall be entered against the corporation in favor of each dissenting shareholder who is a party to the proceeding and is entitled thereto for the value of his shares so determined.

(6) The final order shall include an allowance for interest at such rate as the court finds to be equitable, from the date the corporation action was consummated to the date of payment. In determining the rate of interest, the court shall consider all relevant factors, including the rate of interest which the corporation would have had to pay to borrow money

during the pendency of the proceeding. If the court finds that the refusal of any shareholder to accept the corporate offer of payment for his shares was arbitrary, vexatious or otherwise not in good faith, no interest shall be allowed to him.

(7) Each party to such proceeding shall bear its own costs and expenses, including the fees and expenses of its counsel and of any experts employed by it. Notwithstanding the foregoing, the court may, in its discretion, apportion and assess all or any part of the costs, expenses and fees incurred by the corporation against any or all of the dissenting shareholders who are parties to the proceeding, including any who have withdrawn their notices of election as provided in paragraph (e), if the court finds that their refusal to accept the corporate offer was arbitrary, vexatious or otherwise not in good faith. The court may, in its discretion, apportion and assess all or any part of the costs, expenses and fees incurred by any or all of the dissenting shareholders who are parties to the proceeding against the corporation if the court finds any of the following: (A) that the fair value of the shares as determined materially exceeds the amount which the corporation offered to pay; (B) that no offer or required advance payment was made by the corporation; (C) that the corporation failed to institute the special proceeding within the period specified therefor; or (D) that the action of the corporation in complying with its obligations as provided in this section was arbitrary, vexatious or otherwise not in good faith. In making any determination as provided in clause (A), the court may consider the dollar amount or the percentage, or both, by which the fair value of the shares as determined exceeds the corporate offer.

(8) Within sixty days after final determination of the proceeding, the corporation shall pay to each dissenting shareholder the amount found to be due him, upon surrender of the certificates for any such shares represented by certificates.

(i) Shares acquired by the corporation upon the payment of the agreed value therefor or of the amount due under the final order, as provided in this section, shall become treasury shares or be cancelled as provided in section 515 (Reacquired shares), except that, in the case of a merger or consolidation,

they may be held and disposed of as the plan of merger or consolidation may otherwise provide.

(j) No payment shall be made to a dissenting shareholder under this section at a time when the corporation is insolvent or when such payment would make it insolvent. In such event, the dissenting shareholder shall, at his option:

(1) Withdraw his notice of election, which shall in such event be deemed withdrawn with the written consent of the corporation; or

(2) Retain his status as a claimant against the corporation and, if it is liquidated, be subordinated to the rights of creditors of the corporation, but have rights superior to the non-dissenting shareholders, and if it is not liquidated, retain his right to be paid for his shares, which right the corporation shall be obliged to satisfy when the restrictions of this paragraph do not apply.

(3) The dissenting shareholder shall exercise such option under subparagraph (1) or (2) by written notice filed with the corporation within thirty days after the corporation has given him written notice that payment for his shares cannot be made because of the restrictions of this paragraph. If the dissenting shareholder fails to exercise such option as provided, the corporation shall exercise the option by written notice given to him within twenty days after the expiration of such period of thirty days.

(k) The enforcement by a shareholder of his right to receive payment for his shares in the manner provided herein shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership, except as provided in paragraph (e), and except that this section shall not exclude the right of such shareholder to bring or maintain an appropriate action to obtain relief on the ground that such corporate action will be or is unlawful or fraudulent as to him.

(l) Except as otherwise expressly provided in this section, any notice to be given by a corporation to a shareholder under this section shall be given in the manner provided in section 605 (Notice of meetings of shareholders).

(m) This section shall not apply to foreign corporations except as provided in subparagraph (e)(2) of section 907 (Merger or consolidation of domestic and foreign corporations). (Amended by L. 1962, Ch. 834, § 40; L. 1963, Ch. 746, § 15; L. 1965, Ch. 803, §§ 20-22; L. 1982, Ch. 202, §§ 3-9; L. 1982, Ch. 928, §§ 38-40; L. 1986, Ch. 117, § 3.)

No. 92-1490

In The

Supreme Court of the United States

October Term, 1992

JEAN LORELLE BURKE,

Petitioner,

v.

ROBERT E. JACOBY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONER'S REPLY BRIEF

RICHARD M. MEYER*
One Pennsylvania Plaza
49th Floor
New York, N.Y. 10119
(212) 594-5300

Attorney for Petitioner

Of Counsel:
LEE S. SHALOV
MILBERG WEISS BERSHAD SPECTHRIE & LERACH
One Pennsylvania Plaza
New York, N.Y. 10119

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

The principal point of law advanced by respondent is that petitioner cannot prevail unless she can demonstrate that she would have dissented from the merger and sought appraisal if respondent had stated the material facts truthfully. R. Br. 10-14. As set forth in the petition (pp. 8-13), this standard of causation has been rejected by this Court and every circuit court of appeals which has previously passed upon the issue. Respondent's brief offers virtually no refutation of the petition in this respect.

Because the Second Circuit is a major forum for the resolution of issues under the federal securities laws, and because corporate takeovers involved values of over $575 billion in 1988,[1] respondent errs drastically in asserting (R. Br. 8) that, "The Petition does not identify a single special or important reason for granting" the writ, particularly in a case of such egregious self-dealing.

Turning to respondent's assertion that petitioner has inaccurately presented the case, we deal with the charges in the order raised by respondent:

> 1. There is not and cannot be any question that the action is brought as a class action. The complaints (both original and amended) allege it in detail. As petitioner pointed out in her main brief in the Court of Appeals (pp. 6, 32 n.15), a request for class certification was made and held in abeyance by the district court. More importantly, however, is the fact that the damage suffered by plaintiff (as well as the other

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[1] Wall St. Journal, January 2, 1990, p. C1.

class members) resulted from the defrauding of the entire body of Class A shareholders.

2. and 3. Although the shareholders knew of the stock option plan and the fact that respondent had received some options, none (save respondent and a few of his intimates) knew that he had awarded himself 80,000 options – amounting to approximately 20% of the Company. The district court found that petitioner did not know of the size of the option award (29a), a finding undisturbed by the Court of Appeals (11a). No reference to the size of the award was contained in the Company's Shareholders Information Bulletins (Ct. of Appeals App. 167-191), nor were all of the directors informed (*id.* at 1303; 1395). More importantly, petitioner does not seek review of the holding that the 1982 award is barred by the statute of limitations, and thus no issue of fraudulent concealment is presented. It is undisputed that, in seeking shareholder approval in 1986, respondent omitted to disclose the number of options he owned.

4. The district court stated that "a reasonable Class A shareholder might have considered the number of options owned by Jacoby and the extent of his potential profit on them significant . . . there may be a genuine issue of material fact as to whether the omission plaintiff complains of was material and misleading . . . " (39a). The Court of Appeals stated, "In the present case, there may be, as the district court noted, questions of fact as to whether the alleged omissions were material, or whether the description of the Lazard Freres opinion was a material misrepresentation, in the sense that reasonable stockholders might have considered the accurate

information important to their decisions as to whether or not to vote for the acquisition. And it may be, as to the claims of omissions, that the undisclosed information was material, thereby prima facie establishing reliance." (15a). The upholding of summary judgment in spite of these material issues is the point which petitioner asks this Court to review and reverse.

5. As noted by the Court of Appeals (5a), the termination of the stockholders agreement became effective upon the consummation of the acquisition, subsequent to which the Class A stockholders received payment for their shares. The redemption of respondent's Class B stock, however, took place *prior* to the acquisition (Ct. of Appeals App. 395, 399; *see also* R. Br. 3), and thus violated the agreement. Again, this issue has little, if any, relevance, since petitioner claims that respondent breached his fiduciary duty whether or not he also violated the stockholders agreement. Pet. 14-15.

In short, the lead point in respondent's brief – that purported inaccuracies in the petition require denial of the writ – is a misconceived attempt to distract this Court from consideration of the serious and significant errors of the Court of Appeals.

With respect to the state law claim, respondent contends that the claim is "moot" (R. Br. 16), apparently because petitioner was pleased with the price paid by Saatchi. Respondent would have this Court interpret that sentiment as approval of the entire transaction and all of its elements, a gross distortion of petitioner's position.

Finally, respondent cites but two cases dealing with petitioner's contention that, under New York law, a defendant may not rely on the proscriptive provisions of BCL § 623 when it has failed to give proper notice; and both cases support petitioner's contention. *Carroll v. Seacroft. Ltd.*, 141 A.D.2d 726, 727-28, 529 N.Y.S.2d 829, 830 (2d Dep't 1988); *Rank Organization Ltd. v. Pathe Laboratories, Inc.*, 33 Misc.2d 748, 753-54, 227 N.Y.S.2d 562, 567-68 (Sup.Ct. N.Y. County 1962).

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

RICHARD M. MEYER*
One Pennsylvania Plaza
49th Floor
New York, N.Y. 10119
(212) 594-5300

Attorney for Petitioner

Of Counsel:

LEE S. SHALOV
MILBERG WEISS BERSHAD SPECTHRIE
& LERACH
One Pennsylvania Plaza
New York, N.Y. 10119

* Counsel of Record